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The order of the court subsequently granting such application retroacts to the day when the motion was filed.

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The only bond which can be required of a party appealing suspensively from a judgment rendered against such party, as a judgment debtor, for a forced surrender of his property under the provisions of sec. 1781, Revised Statutes, is a bond for probable costs.

Such a judgment does not condemn him to pay any sum of money or to deliver any movable or immovable property; hence the appeal bond is not regulated by Arts. 575, 576 and 577, Code of Practice.

In fixing the amount of a devolutive appeal bond, the judge of the lower court must ascertain the amount of probable costs, and in computing the same in appeals from the Civil District Court of the parish of Orleans, he must consider the system which requires the payment of the transcript to or otherwise provided for.

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APPEAL—*Continued.*

judge granting the appeal cannot rescind the order therefor because he subsequently concludes that the injury is not irreparable. With the filing of the appeal bond, fulfilling all the legal requisites, his jurisdiction and control in such case over the matter ceased.

The State ex rel., Trevin vs. Judge etc., p. 192.

Where the sum demanded is above the appealable amount, the fact that an intervention is for less than the amount, will not make the case less appealable, where the plaintiff's claim is rejected and he appeals.

J. D. Walsh vs. L. F. Carrene, p. 199.

The demand is for eleven hundred dollars. The answer admits that three hundred and fifty-six dollars and sixty-six cents had been owing, but avers it had already been paid, and denies owing any more. Motion to dismiss refused, because the pleadings show a claim for more than the appealable sum, and a denial of any indebtedness whatever. Distinction drawn between this and *Denégre vs. Moran*, 35 A, 346.

J. S. Miller vs. Gidière & Marmande, p. 201.

Where the original petition is for an unappealable sum, and an amended petition is filed for the sole purpose of inflating the demand so that our jurisdiction may embrace it, the appeal will be dismissed. It is not more permissible to endeavor to compel jurisdiction by averments of fictitious values than by averments of fictitious claims.

L. A. March, tutrix, vs. L. McNeely et al., p. 287.

A bond of fifty dollars cannot support a suspensive appeal predicated on an order for a bond of one hundred and fifty dollars.

An agreement between parties consenting to a decision of cause at chambers, reserving appeal to either party, on a bond of one hundred dollars for a suspensive, and fifty dollars for a devolutive appeal is necessarily superceded and revoked by a different and subsequent agreement fixing no amount for a suspensive appeal and containing no reference to a devolutive appeal. In such a case, the amount of the bond for either mode of appeal must be fixed by the court and the bond must comply with the order of appeal.

J. O. Poole vs. J. Chaffé & Sons, et als., p. 289.

When defendant has assumed payment of a prior mortgage for one thousand dollars and interest from date, the fact that some interest was already due at the date of the assumption, does not make the suit on said debt appealable.

APPEAL—Continued.

The accrued interest did not thereby become principal, but remained interest, and the debt sued for does not amount to one thousand dollars, exclusive of interest, which is essential for our jurisdiction.

T. S. Buffington, Ex., vs. J. D. Blouin, et al. p. 326.

An appeal must be dismissed when the transcript contains no pleadings, and presents no question of law or fact for decision.

Unless the amount in dispute somewhere appears in the transcript, dismissal ensues for want of jurisdiction; but if jurisdiction is apparent and the transcript is barren of any issue of law or fact, there is nothing to decide, and dismissal equally follows.

Colomb & Gondolfo vs. J. McQuaid, p. 327.

In a case where the amount of the principal demand is not sufficient for the jurisdiction of the Supreme Court, but that of the reconventional demand falls under its jurisdiction, if the defendant obtains an order of appeal from the entire judgment in the alternative and furnishes a bond exceeding the amount fixed for the devolutive appeal bond, his appeal will be sustained on his reconventional demand. *Colomb & Gondolfo vs. J. McQuaid*, p. 370.

Where the transcript is complete, but the certificate of the clerk is defective in not showing it, the omission in the certificate may be supplied by a proper and timely motion.

Where no judgment for damages is rendered or prayed for against the surety on an injunction bond, he is a competent surety on the bond of appeal taken from the judgment dissolving the injunction.

H. Mehnert vs. M. Dietrich, p. 390

Where nothing in the pleadings of the parties nor in the entire record informs the court that the subject matter is within its jurisdictional amount, the Court *proprio matu* will dismiss the appeal.

The fact of its jurisdiction must be made affirmatively to appear.

New Orleans vs. F. Apken, p. 419.

Where there is but one decree, and two appeals are taken from it by different persons, but one transcript need be filed, and it matters not which appellant files it. *Succession of J. Touzanne*, p. 420.

An appeal will not be dismissed where the transcript, in an injunction suit, contains all the proceedings had and all the documents filed therein, and the judgment appealed from is one sustaining peremptory exceptions.

If it was irregular to file the petition for an injunction, under the number and title of the case in which the judgment enjoined was ren-

APPEAL—*Continued.*

dered, the defendant in injunction should have excepted below.
Not having done so there, he cannot object in this Court.

In the absence of any charge and proof, that a transcript is incomplete by the fault of the appellant and where it does not itself appear to be deficient and where the clerk's certificate is in proper form and the record is such that the court can pass upon the case, the appeal will not be dismissed.

The Supreme Court has no jurisdiction over a suit in nullity, to annul a judgment rendered in a case in which the amount in dispute is less than one thousand dollars. It is immaterial what the grounds of nullity be. A claim in damages for a larger amount does not give jurisdiction to annul the judgment.

H. Denegre vs. P. S. Moran, p. 423.

An appellant, in his petition for an appeal, is not bound to name the appellees, but it suffices that he prays that the parties in interest be cited and make such reference to the proceeding that the clerk cannot be misled as to the parties to be cited.

The failure of the clerk to cite, under such a prayer, is no ground for the dismissal of the appeal.

When a third party appeals from a judgment and relies, exclusively, on errors of law to sustain his appeal, of which an assignment is seasonably filed in this Court, the appeal cannot be dismissed because the evidence was not taken down on the trial in the lower court and no statement of facts was made in lieu thereof.

A judgment in which a woman, who is not made a party to the proceedings, is declared to be a lewd person, and is ordered to be ejected summarily from premises which she occupies is a nullity and will be reversed on the appeal of such person, in so far as she is concerned therein. *Succession of Kate Townsend, p. 447.*

A motion to dismiss for incompleteness of the record must contain specifications of the particulars in which it is incomplete.

The fact that an appeal to the court of appeals was taken simultaneous with an appeal to this Court is no ground for dismissal of the appeal here, there being no suggestion of our want of jurisdiction.

An assignment of errors is in time if filed within ten days after the appeal is lodged in this Court.

An assignment of errors on appeal (C. P. 897) is not entirely vitiated because it contains grounds involving alleged errors of fact.

The only effect is that such grounds will be disregarded by the appellate court, but alleged errors of law appearing on the face of the record will be considered and passed upon.

APPEAL—Continued.

The recent amendment to the Constitution touching the appellate jurisdiction of this Court does not apply to a case in which the ownership of property valued at two thousand dollars and damages assessed at one hundred dollars, are claimed.

W. G. Henry vs. P. Tricou, p. 519.

Judgments overruling exceptions in the progress of a cause are interlocutory and come up for review on the appeal from the final judgment when properly presented. A separate appeal from them is neither necessary nor desirable when they do not dispose finally of the suit.

The rules of this Court are not mechanical contrivances to entrap suitors and counsel, but well-considered regulations to promote the efficient performance of public duties.

F. A. Blanks vs. Insurance Company, p. 599.

A rule on the clerk of the lower court, to compel him to complete a transcript of appeal charged as deficient, in not containing oral and documentary evidence admitted, will not be entertained by this Court, where the charge of deficiency is disputed and an issue of facts is raised.

The determination of the issue appertains to the lower court which has jurisdiction over the case for the purpose of having a proper transcript made and transmitted to this Court. 33 A. 422, affirmed.

Transcripts incomplete by the fault of the appellant will justify a dismissal of the appeal. 35 A. 878, affirmed.

Under the disposition already made of the rule taken herein, the present motion to dismiss on the ground of defectiveness of record is premature.

In presence of complete certificate of the clerk, the other grounds set up must fall.

In the absence of a motion therefor, the Court will not dismiss an appeal, although the transcript is defective, by the fault of the appellant, where it contains sufficient evidence to enable the Court to pass upon the case, without injury to appellee.

A. Morrison vs. J. A. Lynch, p. 611.

An appeal lies from the ruling of a district judge increasing the amount previously fixed for the bond to be furnished for a devolutive appeal, although the matter be within the discretion of such judge.

APPEAL—*Continued.*

The main demand being appealable all orders and decrees made in the suit, whether before or after judgment, are revisable by the appellate court.

Such ruling is not a final judgment requiring signature. It is a mere interlocutory order which might work irreparable injury.

Filing of a bond in accordance with an order of appeal does not divest the jurisdiction of the inferior court over questions affecting the sufficiency of the bond; and it matters not whether the insufficiency result from an error of the judge or from default of a party.

Where the inferior court has inadvertently fixed the bond for a devolutive appeal at a sum less than the actual costs, it may, on discovery of the error, amend the order and require sufficient security.

J. W. Demarest vs. W. J. Beirne, p. 751.

When a suspensive appeal had been perfected in a case then appealable, before the promulgation of the constitutional amendment, our jurisdiction thereof vested, although the return-day and actual filing of the transcript did not occur till after such promulgation. The case stands on the same footing with appeals of the same character which had been filed prior to the promulgation, and the transfer thereof to the Circuit Court will be granted.

S. Meyer vs. F. P. Stubbs, p. 795.

The amendments to articles 81 and 95 of the Constitution, promulgated on the 15th of May, 1884, did not impair the right of appeal in cases involving more than one thousand, but less than two thousand, dollars, then pending in the Supreme Court.

The legal effect of the amendments was to immediately strip the Supreme Court of jurisdiction of those cases; but the jurisdiction was thereby destroyed. It was, by the operation of the amendments, transferred to the courts of appeal, with full power to hear and decide said cases.

Hence a motion to dismiss a case of that category cannot prevail in the Supreme Court, whence the appeal unimpaired in all its legal effects will be sent to the proper court of appeal.

R. M. Walmsley & Co. vs. Mrs. S. A. Nicholls, p. 799.

When the Supreme Court was not in session on the return day for appeals, nor for several days thereafter, in consequence of the inability of the judges to reach the seat of the court, and the court was opened by the clerk and adjourned from day to day, an appeal filed on the day the court first sits will be in time.

J. Chaffe & Sons vs. M. E. McIntosh et al., p. 824.

APPEAL—Continued.

An appeal does not lie from an order granting an injunction unless the injury complained of is irreparable.

T. Fontelieu vs. F. S. Gates, p. 833.

In computing the amount of the bond to be furnished for a suspensive appeal from a judgment dissolving an injunction with costs, the proper expenses incurred by the sheriff, as consequences of the injunction for the preservation and cultivation of a sugar plantation under seizure, may be taxed as costs occasioned by the injunction, and must be included in the amount of the bond furnished to be required for such appeal.

When the bond tendered does not cover them, a mandamus does not lie to compel the district judge to grant such appeal on such bond.

The State ex rel. Vial vs. Judge, p. 910.

A transcript of appeal should be filed, docketed and numbered in this Court, on the return day, or within the delay of grace.

Where a transcript of appeal, which consists of proceedings had since the taking of a suspensive appeal, including those for a devolutive appeal subsequently taken, the former having been dismissed, is filed here under the old number given to the transcript under the first appeal, and no new entry, by number and title of the case, on the clerk's docket shows such filing between the return day and the last day of grace, the case will be stricken from the docket as not pending before the Court. Particularly will this be done when the last transcript thus irregularly filed is deficient and the clerk's certificate discloses its incompleteness and does not connect it with the previous transcript. *F. A. Grunow vs. J. Menge, p. 925.*

When an appeal has been granted, under a mandamus from this Court, in conformity to our ruling, a motion to dismiss, based upon the same grounds as was the refusal of the lower court to grant the appeal, cannot prevail.

Where three separate issues are made in the settlement of a succession, all tending to one conclusion, and are the subjects of separate judgments, they may be all brought up in a single appeal, and one appeal bond is sufficient. *Succession of J. Geddes, p. 963.*

ARBITRATION.

Where parties to several suits pending submit their differences to an amicable compounder, with a stipulation that the suits are withdrawn and considered as not filed, the issues in the suits are not open to judicial determination, notwithstanding there is a provis-

ARBITRATION—*Continued.*

ion in the act of submission for an appeal. The finding of the amicable compounder cannot be reviewed for errors of fact or law, but only when he is charged with exceeding his authority or irregularity in his proceedings. *V. Amet et al. vs. Boyer, Adm., p. 266.*

The award of arbitrators, appointed under a submission, as arbitrators "properly so called," rendered without fixing a day, or days of meeting, or without notice of such meeting or meetings, to either party, is a nullity.

The refusal of one of the arbitrators and of the umpire to hear and consider testimony on contested matters, is equally fatal to the validity of the award. *E. E. Dreyfous vs. M. J. Hart, p. 929.*

AUCTIONEERS.

The final section of the Revised Statutes repeals "all laws and parts of laws on the same subject matter, except what may be contained in Revised Civil Code and Code of Practice, etc." The subject matter of the Act of 1805, entitled "An Act to regulate sales at auction," invoked in this case, is identical with that covered by the provisions of the Revised Statutes, under the heading of "Auctioneer" and "Auction Sales." So far, therefore, as the provisions of the act of 1805 have not been perpetuated in the Revised Statutes or the Codes of 1870, they are repealed.

Board Charity Hospital vs. C. E. Girardey, p. 605.

CAPIAS AD SATISFACIENDUM.

Under the provisions of Art. 730 C. P. a *capias ad satisfaciendum* can issue against a former sheriff, whenever a judgment has been rendered against him for moneys received by him, in his official capacity, and not accounted for and the *feri facias* issued has been returned "no property found."

Under such writ, it is the duty of the sheriff, to whom it is addressed, to arrest and incarcerate the body of the defaulting official and to retain it without the benefit of the insolvent laws, at the expense of the judgment creditor, until the amount of the judgment, in capital, interest and costs, has been fully satisfied.

The act of 1840, abolishing imprisonment for debt, has no effect on the act of 1841, providing for imprisonment of delinquent sheriffs and which is now Art. 730 C. P.

John Chaffe & Sons, etc., vs. Thos. H. Handy et al., p. 22.

CERTIORARI.

In an application for a writ of *certiorari*, the record of the proceedings below makes full proof of itself, and is conclusive if not assailed and proven to be incorrect or untrue.

The unsupported affidavit of the relator, of facts and proceedings, when contradicted by counter affidavits, and negatived by the record, cannot avail the applicant.

The State ex rel., Regan vs. Judge, etc., p. 977.

CHARTER-PARTY.

The stipulation in the contract of charter party that the "vessel is to have a lien on the cargo for freight, dead freight and demurrage," is valid and binding as between the owners and charterers, and the former have a right to require that the cargo furnished by the latter shall be subject to such lien. When cargo is offered shipped as the property of the third persons, the latter would not be bound by such lien in absence of their consent, express or clearly implied, to the conditions of the charter party. The owners, therefore, have the clear right to have such consent expressed upon the face of the bills of lading, and their refusal to grant clean bills cannot be complained of by the charterers as a breach of the contract.

Gomila & Co. vs. Adams Brothers, p. 221.

Where the owners of a steamboat are captain and clerk of her and she is chartered for a year, the charterer stipulating the privilege of appointing the captain and officers, and no change is made of the existing officers, it is a tacit appointment of them.

The boat is not less in the custody of the charterer because the master is also part owner.

Where the charter-party gives the charterer full and absolute control of the boat, when, where and how she shall be employed, he is responsible for damage done to the boat when 'laid up' equally as when *en voyage*.

When the charter-party contains the agreement that the charterer shall be responsible for damage from unavoidable accident, and that the owner shall have the damage repaired which shall be reimbursed him by the charterer, the owner is entitled to judgment for such sum as he shall prove was expended by him for such repairs, after deducting the amount paid by insurance companies on their policies.

F. W. Ames vs. Transportation Co. p. 479.

The condition in a charter-party, "Vessel to have lien on cargo for freight, dead freight and demurrage," though binding between the parties, only affects cargo shipped by third persons when the latter, expressly or impliedly, have consented thereto.

CHARTER PARTY—*Continued.*

Mere knowledge of the existence and terms of the charter-party, if accompanied by no modifying facts, might suffice to bind the third shipper to its conditions. But when the course of dealing of the vessel has been such as to lead shippers to suppose that the conditions would not be insisted on, and, under such belief, the goods had been sent to the vessel, and when the vessel's agent must have known, when they received the goods, that the shipper would not assent to the conditions, the implication of consent must fail and defendants should not have laden the goods unless they were willing to give clean bills.

Under the circumstances of this case, held that defendants were bound either to give clean bill of lading or return the goods.

Leisy & Co. vs. W. Buyers et al., p. 705.

CRIMINAL LAW.

APPEAL.

This Court, under its limited jurisdiction in criminal matters, can only review the ruling of the district judge refusing to grant a new trial—the motion therefor involving mixed questions of law and fact—when a bill of exceptions is taken to such ruling, and the evidence introduced on the trial of the motion is embodied in the bill or annexed and made part of it. Nor can the omission be supplied or cured by filing in this Court an assignment of errors founded on the same grounds and referring to the same evidence. If the new trial is applied for on the ground of newly discovered evidence in the absence of any affidavit from the witness designated in the motion, as to the facts expected to be proved and annexed thereto, the motion will not be considered. Nor when it is apparent that there was a want of diligence in procuring the testimony.

A motion in arrest of judgment must be based on substantial defects in the indictment or irregularities in the proceedings, patent on the face of the record—evidence *aliunde* to support it not admissible.

The State vs. S. Miller, p. 158.

The object of a formal bill of exceptions is to apprise the appellate court of what has been deemed exceptionable and the grounds therefor. Where, therefore, no grounds are set out in the bill, there is nothing upon which the court can act.

The State vs. W. Green, p. 185.

An appeal will not be entertained in a criminal case where no sentence has been passed or where the record contains no evidence of any sentence.

The State vs. P. Johnson, p. 306.

CRIMINAL LAW—*Continued.*

APPEAL.

The caption of a record is a notification from an inferior to a superior court, of the title of a case, its origin, progress, and determination, showing time, place and authority. Where a record discloses those particulars, it is such condition as authorizes the appellate court to consider and pass upon the matters presented. It is not necessary that it should show, where the cause was decided, or that the term at which it was determined, was a legal one, where the law fixes the place where the court holds its sessions and regulates the terms for the trial of cases. Objections on that score, where there are grounds, therefore, should be urged below, and if overruled, reversed by bill.

Entries in the minutes (*all in presence of accused*) in a capital case, sufficiently indicate the presence of the accused, *in person*, in open court, although the fact might have been made to appear in a more explicit and better form. *The State vs. C. Nelson*, p. 674.

Where an appeal is taken by a person convicted of a crime and under sentence, who escapes from custody during the pendency of his appeal, and who remains a fugitive, his appeal will be dismissed.

The State vs. F. Edwards, p. 863

Where, on appellant's own motion and suggestion, an appeal is made returnable at a time and place different from those required by the provisions of a mandatory law, and where the order of the judge granting the appeal shows that he merely adopted the suggestion of appellant by granting the appeal, "as prayed for," the error is imputable to the fault of appellant, and, under the settled jurisprudence of the State, the appeal must be dismissed.

The constitutional right of appeal is a right of appeal in conformity with law.

Rules of practice, when once settled by authoritative decisions, must, in public and private interest, be adhered to.

The State vs. B. Jenkins et al., p. 865.

CHARGE.

The trial judge, at the request of the jury and in the presence of the accused and his counsel and where no objection is made, has a clear right to instruct the jury as to the different verdicts which they can render.

The bill of exceptions taken after the jury had retired from the box and which does not show the ground upon which it is based, is not entitled to notice.

CRIMINAL LAW—Continued.

CHARGE.

The trial judge is right in refusing to charge the jury, that "where a witness, credible and of good character swears affirmatively to the existence of a fact; that they heard and saw things, that the testimony of witnesses as thus swear affirmatively is entitled to more weight than the testimony of witnesses of good character and credible who swear negatively that they did not see or hear." The charge, *as asked*, was too broad and lacked precision. Evidence of a negative nature, may, under particular circumstances, not only be equal, but superior, to positive evidence. Also, where a negative depends on the establishment of an opposite fact, such as an *alibi* for instance.

Where the judge was requested to charge the jury in writing and has done so, and where he is subsequently asked to give a special charge and expresses a readiness to give the same orally, or in writing, and it appears that counsel are willing that he should give the same orally and he does so, there is no occasion to complain that the same was not given in writing.

The State vs. E. D. Chevallier, p. 81.

It is undoubtedly correct, as a rule, that an erroneous instruction or charge to the jury can not be corrected simply by another instruction or charge which states the law accurately; but the rule does not obtain where the erroneous instruction is expressly admitted to be such and is formally withdrawn from the jury by the trial judge, who, in doing so, gives the law correctly, as should have been done at first.

The State vs. W. Jones, p. 204.

EVIDENCE.

Testimony offered to show that the deceased was not in the habit of carrying deadly weapons, is irrelevant, in a prosecution for murder, where the defense is *self-defense*.

That the deceased had large and influential family connections and friends; that the life of the accused, after the killing and before his bond was forfeited, was threatened by relatives of the deceased, is irrelevant testimony to rebut the presumption of guilt claimed to result from the forfeiture of the bond and flight from justice.

The State has a right to reexamine a witness, before his leaving his seat, touching a matter testified to by him on cross-examination.

Testimony to establish that threats were made, is inadmissible, where it is not offered also to prove that they were communicated to the accused.

CRIMINAL LAW—Continued.

EVIDENCE.

The testimony of witnesses, not yet heard, cannot be impeached. An attempt to do so, is premature.

Evidence is admissible to show the condition of the weapon of the deceased, when found.

The State vs. E. D. Chevallier, p. 81.

When in a prosecution for murder the evidence shows that the accused was the aggressor and pursued the deceased with a drawn knife, with which he afterwards gave the mortal stroke, testimony of the dangerous character of the deceased was properly rejected.

It is unnecessary to review the ruling of the trial judge, admitting as a dying declaration a statement of the deceased to the effect that the accused had inflicted the mortal wound, in view of the fact that the accused set up the plea of self-defense, which admitted the killing. The accused could not, therefore, be prejudiced by the admission of the declaration, as it only went to prove an admitted fact.

Where, at the opening of the trial, an order is made for the removal of the witness from the court room, and a deputy sheriff, a witness for the State, in ignorance of the order, came into the room during the trial, such fact would not of itself operate absolutely to the exclusion of his testimony. The judge could, in his discretion, admit it.

The State vs. P. Watson, p. 148.

A judge can and ought to interpose when a useless and irrelevant examination of a witness is going on, and prevent the waste of time and distraction of the attention of the jury.

Confessions made voluntarily, and without the exercise of any influence to extract them, are admissible. *State vs. Parks, 21 A. 251, overruled.*

The State vs. J. McGee, p. 206.

A voluntary confession of a prisoner is admissible in evidence against him.

The cross-examination of a witness may embrace any matters pertinent to, and growing out of, or connected with what has been elicited on the examination in chief.

The State vs. L. E. Poynier, et als., p. 572.

Evidence to show that the accused had made efforts to cause the deceased to leave the country, in reference to a criminal prosecution instituted against him by the latter, who is the material wit-

CRIMINAL LAW—*Continued.*

EVIDENCE.

ness in such case, and that in that connection he had made threats against the deceased, is admissible, as it tends to show elements of malice in the homicide.

Evidence of the dangerous character of the deceased and of threats made by him against accused, unless preceded or accompanied by evidence of an assault or overt act, or of some hostile demonstration, at the time of the killing, is inadmissible as a defense against the charge of murder. The law of self-defense expounded.

The State vs. J. Birdwell, p. 857.

A voluntary confession of the accused, not made under restraint or constraint, is admissible in evidence. If it is admitted by his consent, he cannot afterwards object to it.

The State vs. F. Wilson, p. 864.

Conversations with the prisoner touching his identity are admissible to prove that fact, no inducement, threat or promise having been made to him or in his presence.

The State vs. J. Foster, p. 877.

In a criminal prosecution the accused has the right to object to the introduction of a dying declaration, on the ground that when he made it the declarant did not believe that he was about to die. In support of his objection it is competent for the accused to introduce testimony tending to show that when the declaration was made the declarant was not under the sense of an impending dissolution, but that he had hopes of recovery.

The decision of the true condition of the deceased as a test of the admissibility of his declaration is within the exclusive province of the court.

The State vs. E. Molisse, p. 920.

GRAND JURY.

The incompetency of one member of a grand jury vitiates an indictment found by it, and a motion to quash, on such ground, made prior to plea, is timely and proper.

The State vs. H. Rowland, et al., p. 193.

INDICTMENT.

In an indictment for shooting with intent to commit murder, the intent must be described in terms which would be sufficient, in case the act had resulted in death, to sustain an indictment for murder.

CRIMINAL LAW—Continued.

INDICTMENT.

The qualification of the intent as "felonious" merely, without the addition of "wilfully and of malice aforethought," describes only an intent to commit manslaughter and not murder. R. S. § 1048.

The defect is substantial and is a proper subject for motion in arrest of judgment. *The State vs. Marshall Green*, p. 99.

Under an indictment for shooting with intent to commit murder, it is unnecessary to charge specifically that the accused did "wilfully, feloniously and of his malice aforethought," shoot, etc. It is not defective where the words "*felonious and with intent to commit murder*," are used. Those words are amply sufficient under the Statute.

Under such a charge, the jury can find a verdict under either Section 791 or 792 of the Revised Statutes. The two crimes provided against are of the same generic class, the greater including the less.

In such a case, a verdict of "Guilty of shooting at with intent to commit murder," is responsive to the indictment.

The State vs. G. Frances, p. 336.

The words "*goods and chattels*" are not sacramental in an indictment for larceny. The word "*property*" used is generic and implies personal property, goods and chattels.

The State vs. F. Bayonne, p. 761.

It is not requisite to the validity of an indictment for assaulting with intent to murder that it should aver that the person assaulted "was in the peace of the State." Nor in such indictment is it necessary to charge that the accused was armed with a dangerous weapon or that a battery was inflicted.

Sec. 792 R. S., under which the indictment was framed, denounces two distinct offenses; one assaulting by wilfully shooting at, the other assaulting with intent to commit murder, etc., and an indictment will lie for either offense.

The State vs. A. Simien, p. 923.

INFORMATION.

It is no bar to an information for manslaughter, that the grand jury has, prior to its filing, ignored an indictment for murder, for the same homicide.

Omission in the information, of the averment that the deceased was, at the time of the killing, "in the peace of God and of the State," is no ground for arrest of judgment.

The State vs. Boy Vincent, p. 770.

CRIMINAL LAW—*Continued.*

JURY.

Objections to the manner of drawing and summoning the jury, and of organizing the grand jury must be urged before plea and trial, and come too late when made after verdict.

Arrests of judgment arise from intrinsic causes appearing on the face of the record, hence irregularities in the drawing and the summoning of the jury, and in the composition of the grand jury cannot be heard in a motion in arrest of judgment.

The State vs. N. Jackson, p. 96.

A juror who, upon his *voir dire*, said he had formed a fixed deliberate opinion, but on further interrogation admitted that he should be guided solely by the testimony on the trial and the law as applied thereto, and who had not talked with any of the witnesses, and had no bias or prejudice, is a good juror.

The fact that one of the grand juries who found the bill is an unnaturalized alien, cannot be taken advantage of in a motion for arrest. This personal disqualification of a grand juror may be pleaded in abatement, and whatever is pleadable in abatement is waived by a plea in bar.

Non-residence of a petit juror in the parish where the trial is had for twelve months immediately preceding the trial cannot be the subject of a motion in arrest. *The State vs. J. McGee, p. 206.*

The trial judge, in a criminal case, is vested by law with the discretionary powers to discharge jurors already empaneled in the case and to reassign the cause for another day, if he believes that there is a necessity for such ruling, and that the ends of justice will be best subserved by such a course.

The belief of the judge, apparently well founded, that the jurors already selected and sworn had been illegally drawn, is manifestly a reason to justify such ruling. *The State vs. J. Lawson, p. 275.*

The additional jurors, which the Act of 1877 empowers the judge to have drawn, are a part of the regular panel, and their names should be placed in the jury box along with those drawn before the meeting of court, and are to be offered for acceptance or rejection as chance may determine.

A jury law with its complex details must be so construed as equally to conserve the interests of the public in the vindication of law and order, and to guard the right of individuals to a fair and impartial trial. *The State vs. W. Brooks, p. 334.*

CRIMINAL LAW—*Continued.*

JURY.

In a criminal prosecution a juror is not incompetent because it is shown that on the day before the trial he declared in a public store that he intended to convict every person tried before him as a juror, and when it is shown that on his *voir dire* the juror showed that he had no bias or prejudice in the case. Courts will not consider gossip in determining the legal qualifications of jurors.

A juror who acknowledges to have formed an opinion in the cause, but asserts that such an opinion will readily yield to the evidence on the trial, and that he feels able to do impartial justice in the case, is competent. *State vs. Dugay*, 35 Ann. 327; and other decisions affirmed.
The State vs. J. Birdwell, p. 857.

Objections to the form of the oath administered to the jurors must be made at the time of their qualification. Such objections are assimilated to those made to the possession by a juror of the proper qualifications, which must be made when he is offered, and to those that may be made to the list of jurors, which must be complained of when the imperfection or defect is discovered. It is too late to object to the form of the oath in a motion for a new trial.
The State vs. F. Wilson, p. 864.

The fact that one presented as a juror has formed an opinion from rumours of the case and has expressed it, does not disqualify him if he avers that the rumours would not influence him as a juror, and that he will be guided by the evidence in rendering a verdict.
The State vs. J. Foster, p. 877.

NEW TRIAL.

An accused who offers to support his affidavit on a motion for a new trial on the ground of newly discovered evidence, by the testimony of the newly discovered witnesses themselves, when he produces them in court on the trial of the motion, is entitled to such a hearing. On the judge's refusal to hear such witnesses, the case will be remanded for the purpose of taking such testimony, or to give to the accused the benefit of the affidavit of said witnesses.

The State vs. J. Hyland, p. 87.

Applications for new trials in criminal cases on the ground of newly discovered evidence must always be received with caution. The inducements to false swearing on the part of the person convicted are obvious, and therefore the rule is well established that his affi-

CRIMINAL LAW—*Continued.*

NEW TRIAL.

davit alone will not suffice. It must be supported by the affidavits of others, and when possible, by those of the newly discovered witnesses.

The mere statement that the accused did not know of the testimony in time to have brought it forward, is not sufficient. It must appear that he could not have ascertained it by reasonable diligence.

Great reliance is placed upon the trial courts by appellate tribunals that they will exercise the discretion entrusted to them, in the matter of granting new trials in criminal cases, well and wisely, and consequently their refusal to grant them is rarely disturbed.

The State vs. N. Washington, p. 341.

New trials in criminal cases are not grantable for newly discovered evidence if it be only cumulative.

The State vs. J. Hyland, p. 709.

An accused will not be entitled to a new trial on account of the absence of witnesses at the trial, though duly summoned, where it appears that no continuance or postponement was asked because of their absence and where he consented to go to trial without them, and stated that he could not make an affidavit for a continuance on account of their non-attendance.

The absence of the accused from the court-room while testimony is being taken on an application for an attachment for a witness, affords no ground for setting aside the verdict.

The State vs. A. Simien, p. 923.

A motion for a new trial on the ground of newly discovered evidence must be refused when the affidavit of the accused shows that the evidence, so far from being newly discovered, was known to him all the while. Such motion must be supported by other testimony in addition to the affidavit of the accused. His alone will not suffice.

When four days have elapsed between the conviction and the sentence and the defendant's counsel complains that he wants more time to prepare a motion in arrest, he is without excuse and further delay was rightly refused.

The State vs. J. J. Cotten, p. 980.

PRESCRIPTION.

Where an indictment for a prescriptible offense is filed more than a year after its commission, and prescription is therein negatived by the usual averments, the onus is not on the State to prove the negative, but on the defendant to establish the affirmative; *i. e.*, that

CRIMINAL LAW—*Continued.*

PRESCRIPTION.

the commission of the offense was made known to some competent officer more than one year previous.

Where a horse was stolen in one parish and sold in another, to a person who, at the time, was a justice of the peace in the latter parish, from whom it was recovered by the owner, a knowledge of the crime thus derived by such officer, to whom the name and whereabouts of the offender is unknown, and being without authority or jurisdiction in the parish where the crime was committed, does not affect the question of prescription.

The information to such officer, in contemplation of law, to have such effect must arise from a formal complaint against him.

The State vs. J. Barfield, et al., p. 89.

When a party is indicted for murder and convicted of manslaughter, the judgment should be arrested if the crime had not been denounced to a public officer having the power to direct a prosecution within one year previous to the finding of the grand jury, and the accused had not fled from justice. Nor could proof be offered of these causes of the suspension of prescription unless the same are averred in the indictment. The arrest of judgment in such a case does not debar another prosecution for manslaughter under a sufficient and proper indictment.

The State vs. M. Victor, p. 978.

PRINCIPAL AND ACCESSORY.

The general rule of law is that what one does through another's agency is to be regarded as done by himself. One whose sole will procures the commission of a criminal act is principal, without regard to the physical agencies he employs, and whether he is present or absent when the act is done.

The test to determine whether one is principal rather than accessory is whether he is so situated as to make his personal help available—not actual physical help necessarily, but help of any kind—not help rendered by actual presence but constructive presence as well. Thus if he watched to prevent his companions being surprised, or stationed himself to give the alarm to favor their escape, or was in such situation as to come to their assistance, so that the knowledge of his watching, or position, or situation inspired or was calculated to inspire his confederates with additional confidence, and enable them quicker or safer or more effectually to commit the crime, then he is a principal.

CRIMINAL LAW—*Continued.*

PRINCIPAL AND ACCESSORY.

If one, with knowledge that the commission of a crime has been determined on, gets away and keeps away from the spot for the purpose of facilitating the commission of it, he is a principal although he is not present or near enough to give assistance physically and manually to his confederates.

The State vs. L. E. Poynier, et als., p. 572.

STATUTES.

The assistant district attorney of the parish of Orleans has authority to prepare, sign and file an information regardless of the presence or the absence of the district attorney, or his inability from sickness.

Where a statute declares that the punishment for a certain offense shall not exceed a stated number of years, with or without hard labor, and also authorizes the imposition of a fine, and the accused is sentenced to imprisonment at hard labor for the entire term declared and to the payment of a fine, there is no warrant in law for the infliction of the additional punishment at *hard labor* for another year in default of paying the fine. *The State vs. L. Ryder, p. 294.*

The word 'imprisonment' alone and unqualified, when used in criminal statutes, is in contradistinction to 'imprisonment at hard labour,' and means any other confinement than the latter.

Where the punishment of a crime is imprisonment at hard labour and a pecuniary fine, and both are inflicted, and in default of payment of the fine, the criminal is sentenced to another term of imprisonment at hard labour, the alternative punishment must be altered to imprisonment.

Every convicted criminal should be adjudged to pay the costs of the prosecution, and should be compelled to pay them, if legal process can be made effective. *The State vs J. Hyland, p. 709.*

TRIAL.

A continuance should not be granted and is properly refused on the ground of the absence of a witness, where legal steps have not been taken and due diligence used to secure him and when the case was fixed by consent, without any reserve of rights; the more so, where the evidence, if offered, would not be admissible. It is only where the exercise of the legal discretion was arbitrary and oppressive, that the appellate court will interfere, and then, provided the refusal has worked a manifest injury.

The State vs. E. D. Chevallier, p. 81.

CRIMINAL LAW—Continued.

TRIAL.

In the absence of any appearance on the record that the defendant requested the court to assign counsel, or applied for continuance on the ground of absence of counsel of record, the mere fact that the trial proceeded without the aid of counsel to defendant does not constitute error. *The State vs. Doyle, p. 91.*

The trial judge has large discretion in granting continuances, which will not be interfered with unless for good cause.

A refusal to permit a prisoner's counsel to ask a State witness on cross-examination, if he was not anxious to have the prisoner convicted, is good ground for the reversal of the judgment, but when the question was answered without hindrance, and the court afterwards interfered solely to prevent the intimidation of the witness, it is not error.

Great latitude is permitted in the cross-examination of witnesses on a criminal trial, and the feelings, motives and prejudices of a witness may be probed by either side.

Want of service of a copy of the indictment must be pleaded *in limine*, and cannot be moved in arrest of judgment. *A fortiori* must non-service of a list of witnesses, upon whose testimony the bill was found, be pleaded before going to trial, even if the prisoner was entitled to have such list delivered to him.

A prisoner has not the right, under our statute, to have delivered to him a list of the witnesses who appeared before the grand jury, and therefore it is not essential with us that the names of such witnesses shall be indorsed upon the bill.

The State vs. J. Kane et al., p. 153.

After the evidence is closed in the trial of a criminal case the defendant cannot be allowed to introduce other testimony, even with a view to contradict statements of a state witness, drawing out of him in rebuttal, on the pretense that his statements embraced new matters. The proper course is to object to such testimony or to move for its expulsion. There must be an end of the trial, which would otherwise be protracted indefinitely.

A motion in arrest of judgment is not the proper mode of presenting objections to the manner of drawing or organizing either the grand or petit jury, or of presenting errors not apparent on the face of the record.

CRIMINAL LAW—*Continued.*

TRIAL.

District judges have the right to order special jury terms, at which all criminal cases may be tried. The right is not limited to special terms for the trial of minor offenses with a jury less than twelve in number. *State vs. Claude*, 35 A. 71, affirmed.

The State vs. G. Chandler, p. 177.

The trial judge has always had, and always exercised, the right to question witnesses either for the State or the defense.

A motion in arrest of judgment lies only for defects apparent on the face of the record. A defect which appears only by the aid of testimony cannot be the subject of a motion in arrest.

The State vs. W. Green, p. 185.

A challenge to the array must be made upon the first day of the term, under the requirements of Act 44, of 1879. This act is operative in the parish of Jefferson, and superseded previous acts upon the same subject-matter relating to said parish, special and general.

Where ample opportunity is afforded the accused to procure the attendance of a witness and he fails to have issued a subpoena for him, and there is otherwise a lack of diligence, a continuance should not be granted. That the witness is summoned by the State makes no difference.

Where a witness cannot be found at his usual place of residence, and the search and inquiries for him lead the officers to the conclusion that he has left the State, the deposition at the preliminary trial was properly admitted.

The State vs. P. Coudier, p. 291.

The use of due diligence is a pre-requisite to obtaining a continuance of a criminal prosecution.

Attachments for absent witnesses cannot be issued unless they be personally served with subpoenas.

To procure a continuance because of an absent witness, the accused must aver in his affidavit that he cannot prove by any present witness the fact he expects to prove by him, for whose absence the continuance is prayed. And the fact he expects to prove must be stated.

Where there has been a continuance, and a copy of the indictment has been served on the accused once, it need not be served again immediately preceding the trial.

An objection to a ruling of the trial judge on a criminal prosecution, and a reservation of a bill thereto, noted in the minutes of the

CRIMINAL LAW—*Continued.*

TRIAL.

court, will not be noticed unless the objection is made the subject of a bill duly signed and certified by the judge. The Act of 1877, permitting an objection to be reserved by the clerk taking a note thereof, is an amendment of the Code of Practice, and as that Code regulates the practice of civil causes alone, the amendment can relate alone to those causes.

The State vs. R. Comstock, p. 308.

The legal discretion of the trial judge in a criminal case, in matters of continuances, will not be interfered with unless the ruling complained of is glaringly erroneous and manifestly unjust.

An accused who, on the day of his arraignment, declines the offer of the court to assign counsel for his defense, and informs the judge that he has retained his own counsel, is not entitled to a continuance on the ground that his counsel subsequently abandoned his case, when it appears that the counsel was then assigned to him by the court and defended him through the trial and on appeal.

The State vs. Berry Johnson, p. 852.

Mere absence of a witness, however material, is not ground for a continuance, unless it appears that due diligence had been used, and also that there was just expectation of being able to procure the attendance of the witness in case the continuance were granted.

The State vs. W. Williams, 854.

Non-arraignment, that would have been fatal to the legality of the verdict and sentence, does not exist where, after discovery that the defendant had not been arraigned, he waives arraignment and the trial begins *de novo*, and the jury are re-sworn.

Objections to the form of the jurors' oath must be made when it is administered, and cannot be made the basis of a motion for a new trial.

The State vs. J. Robinson, p. 873.

The exercise of a lower judge's discretion in granting or refusing a continuance will not be disturbed, if it has been done soundly and not harshly or arbitrarily.

A prayer or motion for a second continuance for the same cause, for which one has already been granted, is entitled to less favour than the original application.

The State vs. J. Foster, p. 877.

CRIMINAL LAW—*Continued.*

VERDICT.

Where, after a jury retires to make up their verdict, the court adjourns till the following morning, and subsequently the judge being informed that the jury has agreed and desires to deliver the verdict, convenes the court before the time to which it was adjourned has arrived, and receives the verdict, and the prisoner and his counsel are present and make no objection, such alleged irregularity cannot vitiate the verdict. *The State vs. J. Barfield et al.*, p. 89.

In the murder case, a verdict of "guilty of capital punishment" cannot serve as a foundation for a sentence of death. The verdict, taken literally, convicts the accused of no crime known to the law or charged in the indictment; and if we resort to conjecture as to its true intent, the arguments are equally balanced as to whether it meant "guilty *with* capital punishment," or "guilty *without* capital punishment." *The State vs. W. Foster et al.*, p. 857.

COMMON CARRIERS.

A boat used by its owners and managers for their own purposes and those of others who *agree* to pay certain rates for the transportation of their goods from one point to another and which is not shown to have been held out as a common carrier, cannot be declared to be such, at the instance of any of such *agreeing* parties.

R. M. Flautt vs. M. Lashley, et als., p. 106.

COMMUNITY OF ACQUETS.

Rights of a creditor of the community cannot be defeated by an adjudication of the share of minors in the common property to the surviving spouse and by a special mortgage given in their favor by the latter, to secure their liquidated rights.

Such creditor is entitled to be paid his claim, by preference, half by the widow who has accepted the community and half by the heirs, each for his *virile* share: the minors not to be bound for more than their share of inheritance.

J. E. Ealer vs. Widow Lodge, et al., p. 115.

Where, after marriage and under the *regime* of the community, a business which had formerly belonged to and been conducted by the wife, is conducted in the name of the husband, it becomes the business of the community, and its acquets and good-will are liable to seizure for the husband's debts.

H. Mehnert vs. M. Dietrich, p. 390.

COMMUNITY OF ACQUETS—Continued.

Property composing the community between husband and wife accrues at the dissolution of the community by the death of one of the spouses, in full ownership to the survivor and to the heirs of the deceased eventually, subject to a usufruct in favor of the former and always burdened with the claims of creditors of the community, who can subject it to the payment of their debts.

The surviving spouse and the heirs can mortgage their undivided share or interest in the real estate thus acquired. The mortgage creditor, in seeking payment of his claim (there being no creditor of the community), is entitled to be paid out of the proceeds of sale of such interest, in preference to any claim of the heirs against the surviving spouse not recorded at the date of the mortgage.

The partnership or community, which may have been formed after the dissolution, between the surviving spouse and the heirs, is not to be likened to that once existing between husband and wife. Claims arising after dissolution of that community between the spouses, do not enjoy the rights and privileges attaching to claims against the conjugal community property.

An improper allowance of interest on the decree can be corrected and stricken out, without granting a rehearing.

V. H. Dickson vs. H. J. Dickson, et al., p. 453.

The wife has no proprietary interest in the property and effects of the community until its dissolution. *Tourné vs. Creditors*, 6 La. 459; *Tourné vs. Tourné*, 9 La. 452; *Guice vs. Lawrence*, 2 A. 226.

The husband is head and master of the community; and he may dispose of its revenues and moveable effects gratuitously, without the consent or permission of the wife, and without accountability to her or her heirs. It is only where the wife can prove, satisfactorily, that the husband has disposed of the community property by fraud, to injure her, that she can proceed against the heirs of the husband for one-half. R. C. C. Art. 2404.

Repairs made, during the existence of the community, to the separate property of the husband, used and enjoyed by the spouses, are at the expense of the community; and the revenues of the separate property of the husband belong to the community, which cannot, therefore, be charged with the rents of such property.

The recompense due for improvements to the separate property of the spouses, cannot exceed the enhanced value of the property, at the date of the dissolution of the community, resulting from such improvements. R. C. C. 2408.

COMMUNITY OF ACQUETS—*Continued.*

Money belonging to the child of the father by former marriage, received by him as tutor during the second marriage, is a debt of the second community; and it bears interest from the date at which it was so received and such community is liable for both the principal and interest of the debt.

The widow in community has no claim for money expended by the deceased husband in the maintenance of his heir, child of former marriage, either during the minority or majority of such heir, in the absence of all evidence of any intention on the part of the husband whilst living, of making such charge and the community is entirely solvent and possessed ample revenues during its existence.

The community of acquets and gains is not strictly a partnership; it is the effect of a contract; and it is governed by special law. R. C. C. Article 2807.

The widow in community, administratrix of the succession of the deceased husband, is entitled to commissions on the entire community property inventoried as part of the successions of her husband.

Succession of Dr. P. C. Boyer, p. 506.

COMPENSATION.

Claims acquired by a debtor against his creditor, with full knowledge of the latter's notorious insolvency and for the purpose of obtaining an undue preference, cannot be set up by the former in compensation of his indebtedness, although the insolvency had not been previously judicially declared.

Courts of justice cannot be asked to create a transaction or condition of things, which the law reprobates and forbids and which they would have undone, if called upon to do so.

S. H. Kennedy vs. N. O. Savings Institution, p. 1.

COMPROMISE.

Parol testimony is inadmissible to prove a compromise, which must be reduced to writing.

But a judgment of a competent court of record predicated on a compromise and a resulting consent between the parties, is admissible in proof of a compromise.

Orr & Lindsley vs. W. Hamilton, p. 790.

CONTESTED ELECTION.

An order of a presiding judge recusing himself in a cause on the ground of interest, and appointing the judge of an adjoining court to try the cause, is not vacated or revoked by the fact that the successor of the said presiding judge has in the meantime been commissioned and inducted into office.

CONTESTED ELECTION—Continued.

The order of recusation, if not void *ab initio* on its face, cannot be attacked collaterally, and remains in full force until rescinded or revoked by a direct order from competent authority.

Under Section 1425, Revised Statutes, a speedy trial is imperatively required in all contested elections. If the suit cannot be tried, owing to a physical or legal impossibility, at the next regular term of the court, a special term must be ordered.

A mandamus will lie to compel the judge, even if he be only appointed under a recusation of the judge of the court, to order a special term and to try the case without unnecessary delay.

An appeal does not lie from an order dissolving on bond an injunction in a contested election case.

The State ex rel. Mestayer vs. C. Debaillon, p. 828.

CONFISCATION.

Under the effect of a sale in proceedings for the condemnation and confiscation of an offender's property conformably to the Confiscation Act of Congress, of July 17, 1862, and to the joint resolution explanatory thereto, the offender is absolutely stripped of all rights, titles and claims to the condemned property, and hence he can make no valid disposition of the same, either by deed or will.

The purchaser at such a sale acquires nothing more than a life-estate. The fee simple of the property is then vested in and held by the United States in trust for, and for the benefit of, the heirs at law of the offender, who thus become owners of the fee in expectancy, during the life-estate.

The heirs succeed to the offender by virtue of the laws of nature and descent; and not by operation of the confiscation laws, which merely recognize pre-existing rights.

The heirs of blood of the person whose property has been confiscated, are not third parties, *quoad* such property during the life-estate, hence they are affected and bound by the foreclosure of a pre-existing mortgage on said property, and by the divestiture of the title to the fee operated by such proceedings. Hence they cannot be heard to urge the nullity of such proceedings on grounds which the expropriated party could not be allowed to set up, if he were living and restored to all his former rights.

C. Shields, et als. vs. A. Shiff, p. 644.

CONSTITUTION.

Act No. 71 of 1882, for the purpose of increasing the number of judges in the first judicial district, clearly intended to limit the term of the new incumbent to the time of the next general election, to-wit: the 22d of April, 1884.

That provision is no violative of Art. 109 of the Constitution, which fixes the term of all district judges at four years.

It is the true meaning, intent and spirit of the Constitution that general elections for district judges should occur only once every four years; and that the terms of all elective district judges should expire at the same time.

Hence, the General Assembly in increasing the number of district judges under authority of Article 110, cannot fix a term expiring at a time different from that at which expires the term of all other elective district judges in the State. Such a provision would be unconstitutional.

The State, ex rel. Crain, etc., vs. Hicks, et al., p. 826.

CONTEMPT OF COURT.

The relator having in his possession certain movable property for which a writ of sequestration was issued, and being ordered by the district judge to deliver said property to the sheriff, refused to obey the order and was imprisoned for contempt. He applied to this Court for writs of certiorari and habeas corpus. *Held* that his possession of the property not being under or by order of court, his refusal to deliver it to the sheriff, did not constitute a case of contempt, and that he is entitled to the habeas corpus from this Court.

The State ex rel. A. Hero, p. 352.

CONTRACTS.

A contract for an overseer's wages thus:—I agree to your conditions, viz: \$100 a month, which will be eleven hundred dollars for this year, one month having already elapsed—construed to be a contract for the term and not by the month.

A discharge for good cause disentitles the party discharged to wages for a longer time than he served.

Gross inattention to and non-performance of duties, or conduct such as to endanger the control of the hands and drive them away, and thus entail irremediable loss, conjoined with sickness, which incapacitates him for service, will justify the discharge of an overseer.

An overseer's wages cannot be docked for sickness unless the same be stipulated expressly. Protracted sickness may be sufficient cause

CONTRACTS—Continued.

for discharging him, but so long as he remains in employment he is entitled to his wages.

J. S. Miller vs. Gidiere & Marmande, p. 201.

Notes executed by a young man in favor of his uncle, under the pressure of threats from the latter of taking the life of the former in case of his refusal to acknowledge a pretended indebtedness to his uncle, are invalid, and payment of the same will not be enforced by the courts.

The reverential fear of a relative, coupled with threats, is sufficient to invalidate a contract. *N. Molere vs. J. P. Harp, p. 471.*

In cases of verbal contracts, the declarations of the parties, or either of them, made at the time of entering into the contract, are not to be viewed as admissions, but as direct proof of the contract itself, and therefore do not come under the rule that the admissions of a party are the weakest kind of evidence: which rule is applicable only to admissions respecting the contract subsequent to the making of it. Such subsequent admissions are properly received in evidence to establish the contract and the obligation or liability of the party sought to be bound by it, but it does not follow that the declarations of such party in his own favor, made out of the presence of the other contracting party, going to disprove the contract and his liability under it, are equally admissible. The latter are not admissible, and this rule applies whether the party is living or dead when such proof is offered.

Where one having a claim against a railroad company, fearing its total loss, owing to existing complications resulting from judicial proceedings then pending, proposes to another creditor of the company to try and affect a certain settlement by which it was believed that the threatened loss could be averted, and agreed that, if the settlement was effected by a time stated, the other creditor effecting it might take his claim for a sum named, and the party to whom the proposition is made proceeds to give his time, money and efforts to make the settlement and does accomplish it, he thereby becomes the owner of the claim, subject to the payment of the sum agreed upon.

The party proposing cannot revoke his offer after the settlement is effected, or whilst the other is taking steps to effect it; nor does the death of the party making the proposition before the time fixed arrives, or the amount agreed on is paid over to him, avoid the contract. His legal representative, after his death, is equally bound;

CONTRACTS—*Continued.*

and after the sum stipulated is paid to such representative, he cannot maintain an action for the difference between the face value of the claim and the amount so paid.

K. E. Gordon, Tutrix, vs. F. P. Stubbs, p. 625.

CORPORATIONS.

Plaintiff, two co-heirs and her mother, became joint owners of 200 shares of stock belonging to the community between the last named and her deceased husband, John B. Schiller, in the proportion of one-half to the mother and one-sixth to each of the heirs. Defendant corporation permitted the mother to dispose of 134 shares of said stock, and plaintiff brings this suit to recover one-sixth of said 134 shares. Held, that the mother's transfer must be held valid to the extent of her entire interest in the stock, viz: One hundred shares, and that the sixty-six shares undisposed of belonged entirely to the heirs, and that plaintiff could recover only her share, one-third, of the thirty-four shares unlawfully transferred. Held, that the dividends paid to the mother while tutrix of her minor children, and even afterwards during the existence of a judgment recognizing her as a legal usufructuary of the interest of her children in the community estate cannot be recovered. The subsequent judgment of this court, in an action to annul this latter judgment, only had effect as to third persons, from the date of its rendition, and only authorized the recovery of dividends paid thereafter.

Mrs. Fairez vs. New Orleans City R. R. Co., p. 60.

The managing director of a corporation organized for the business of common carriers, has no right in law to use for his personal benefit and advantage, the boats owned or chartered by the company. Hence, in the absence of a special contract or agreement granting him an immunity from charges for freight on his personal shipments, he must be held liable for payment on his freights at ordinary or card rates.

Parol testimony is inadmissible to show anything against or beyond what is contained in an act of incorporation or tending to show verbal agreements conferring to one of the incorporators valuable privileges or prerogatives at variance with the essence of the act.

The unauthorized acts of an agent of a corporation may be ratified by the board of directors, and such ratification is equal to a previous authority as in the case of natural persons. The knowledge of the board of directors of a corporation of common carriers, that the managing

CORPORATIONS—*Continued.*

director had assumed and performed the duties of master of one of its vessels, and this acquiescence by long silence, in his line of conduct operate a ratification thereof.

The agents of a corporation, like the agents of natural persons, are entitled to reasonable compensation for their services. In the absence of a special contract or agreement fixing their salary, the same will be regulated by the custom with regard to the particular services and their value. Hence, the managing director of a company owning steamboats, who performs the duties of master of one of the boats, when his functions as such are laborious and responsible, is entitled to compensation of the value shown by evidence, and for the rate charged, if shown to be acquiesced in by the directors.

Packet Company vs. J. J. Brown, p. 138.

The commissioners appointed to liquidate a free bank whose charter was judicially forfeited, have no right of action against directors of the institution charged with violation of Sections 300, 301, of the Revised Statutes.

The liability for the debts and obligations of the concern, imposed on the directors as a penalty for such violation, is not an asset susceptible of collection by the commissioners.

It is a claim which accrues to the creditors *ut singuli* and which cannot be enforced by the liquidators.

L. Lacombe et al. vs. R. Milliken et als., p. 367.

The appointment of a receiver to a corporation by one of the district courts for the Parish of Orleans, when it appears that the matter of the liquidation of that very corporation was pending in another and different court for the same parish, is the act of a court without jurisdiction over the subject-matter, and is therefore absolutely null and void. *J. M. Weymouth, Receiver, vs. Mrs. Bouny*, p. 527.

A legislative charter may confer upon a railroad company the right of way upon any street, highway or turnpike in the State, and the right to construct thereon its road.

Under such grant the company is authorized to lay the track of the road upon and through the street of an unincorporated town along its route without further permission or authority. The company cannot, however, so exercise the right and construct the road through a street as unnecessarily impair the right of the public to the free use of such street, and inflict serious and unequal damage upon private property contiguous to said street; and property owners so injured may demand by suit the reconstruction of the track, and under conditions its ultimate removal. *J. Hepting et al. vs. Railroad Co.*, p. 898.

COURTS.

The doctrine is re-affirmed, that this court, in the exercise of its supervisory jurisdiction, will not interfere with the discretion of inferior courts in determining questions within their jurisdiction, arising properly for decision, and decided in regular course of proceedings

The State ex rel. Insurance Co. vs. Judges, etc., p. 316.

The Supreme Court will not review the ruling of the Court of Appeals upon the admissibility of evidence by any of the writs under which it exercises supervisory jurisdiction over inferior courts.

The State ex rel. Bright vs. Judges, p. 481.

Under our laws and jurisprudence, all parties who do not appeal from a judgment are appellees and the judgment cannot be reversed or amended as to them.

Hence, in a case brought from this Court to the Supreme Court of the United States, and our judgment is there reversed, none but the party who took the writ of error can invoke any relief under the judgment of reversal, although the interests of other persons who were parties to the original suit, could be affected by the judgment.

When this Court is instructed to render a decree so as to conform to the opinion of the Supreme Court of the United States, it will not render a judgment which militates with the established rules of our jurisprudence. It is an inherent power in the highest court of every State, even while enforcing a judgment of the Supreme Court of the United States, to decide upon its own jurisdiction and upon the jurisdiction of all inferior courts to which its appellate power extends.

Widow M. Murphy vs. Insurance Co. et al., p. 953.

DAMAGES.

An action for damages for a malicious prosecution cannot be maintained, unless malice and want of probable cause are affirmatively shown, and a resulting injury therefrom.

H. Coleman vs. Hibernia Insurance Co., et als., p. 92.

In an action for a malicious prosecution, the discharge of plaintiff by the committing magistrate, is *prima facie* evidence of the want of probable cause, sufficient to throw upon the defendant the burden of proving the contrary.

A charge made on information received, which is not supported by any evidence, is not based on a probable cause.

B. Bornholdt vs. J. B. Souillard, p. 103.

Where the writ of civil arrest has been finally set aside by judgment of the court which issued it, that forms *res judicata* as to the wrongfulness of its issuance and subjects the party who provoked it to liability for actual damages.

DAMAGES—Continued.

In absence of proof of malice or want of probable cause, none but actual damages can be recovered.

Counsel fees for prosecuting suit for damages not allowed.

M. Roos vs. P. Goldman & Bro., p. 132.

A sheriff or United States marshal cannot be made responsible, in damages, for executing a judgment, recognizing a privilege upon property provisionally seized in the suit, by the seizure and sale of said property.

Where, in such a case, upon the demand of a third person claiming ownership of said property, an indemnity bond has been furnished, conditioned for the payment of such damages as might be recovered against the marshal in consequence of such seizure, the surety on such bond cannot be held for any damage other than those for which the marshal might have been liable, and, inasmuch as the marshal could be responsible for none, the action must fall.

F. E. Foucher vs. D. F. Kenner, p. 149.

An action in damages against a common carrier for injury sustained by goods between delivery by consignor for transportation and delivery at the place of destination, arises from the breach of the contract of affreightment *ex contractu*, not from a *quasi offense ex delicto*. The negligence or non-feasance does not constitute a case of trespass, which implies the actual commission of an act by the use of force or violence.

A suit to recover damages said to have been thus sustained in consequence, must be brought at the place of domicile.

Heirs of Gossin et al. vs. C. C. Williams et al., p. 186.

In an agreement between a sugar planter and another party for the cultivation of a crop on joint account, the planter is not responsible in damages, for injury done to his co-associate's cane by an unexpected freeze, or for delay in saving the crop, when impeded in his operations by incessant rains and bad roads.

In a settlement of accounts between such parties the court cannot reject the itemized account of one of the parties on the ground that the charges are excessive, and consider expert testimony for the purpose of ascertaining the *quantum meruit*. The items of the account must be scrutinized under the evidence, and rejected or allowed under the preponderance of evidence.

M. L. Spencer vs. Mrs. L. Cullom, p. 213.

DAMAGES—*Continued.*

The burden of proof in a suit in damages for the killing of animals by a railway company rests on the plaintiff to show negligence. *Stevenson's case*, 35 A. 498, affirmed.

A company which is induced to build its road through certain lands, which does so, and which is permitted to run its trains regularly through the same, cannot be considered as a trespasser.

A company is not at fault for not fencing in its track, although the same runs through a pasture ground, in the absence of contract or law requiring that protection.

Mrs. L. C. Day vs. Railway Company, p. 244.

When persons mutually engage in bandying opprobrious epithets, an action of slander for words thus uttered will not be encouraged.

In a suit in damages for trespass, and assault and battery, in which the jury clearly fail to render a proper verdict, the appellate court reviewing the facts will set the verdict aside and render such judgment as the nature of the case and justice may demand.

J. W. Johnston vs. E. J. Barrett, p. 320.

A party for whom constructions consisting of improvements and appurtenances have been made under contract, who has accepted the work, has expressed his satisfaction therewith, and settled therefor without objection or complaint, is estopped for claiming damages for alleged violations of said contract.

Under a contract for general work, in which the owner makes a direct contract with a carpenter and engineer for these respective specialties, the general contractor cannot be held responsible in damages for the alleged shortcomings of either.

A. DeLambre vs. M. J. Williams, p. 330.

An action for damages for the wrongful issuance of a writ of provisional seizure, not being based on any bond, is for a *quasi offense* and prescribed by one year.

An action of ejectment by a landlord against a tenant, unaccompanied by any interference with person or property, forms no ground of claim for damages, without clear proof of malice and want of probable cause.

The landlord's right of re-entry into the leased premises, after the expiration of the lease, is absolute; and when the person left in physical possession by the tenant voluntarily surrenders the keys and possession to the landlord, even against the tenant's will, the landlord's peaceable entry violates no right of the tenant and gives the latter no claim for damages.

L. Johnson vs. B. Meyer, p. 333.

DAMAGES—Continued.

A tenant who quits premises, to which he claims to have obtained a new lease, and which he declares he has left because ordered to do so by his landlord, cannot successfully claim damages for an illegal and wrongful ejectment.

S. H. Smith vs. A. M. Haas, p. 413.

A railway company that has destroyed a levee for its own convenience and without authority, building another at a different place, which gives away shortly thereafter, is responsible for the damages consequent thereon.

F. M. Hotard, et al., vs. Railroad Co., p. 450.

In an action for damages where the causes of damage are set forth in such a manner as to enable the defendant to ascertain with reasonable certainty the grievances complained of and their nature, the suit should be dismissed on an exception of vagueness in the allegations

Where a party proceeds by attachment against another, when at the time he is indebted to the one proceeded against for a larger amount than he claims, and on trial a judgment is rendered against him for this balance and all costs, it cannot be held in a subsequent suit between the parties, that the attachment had been maintained.

Hamlet, Bliss & Elliott vs. Fletcher, Wesenberg & Co., p. 551.

Where a child of tender years is injured by running under a mule which is being driven at an ordinary trot, and without negligence by the driver, no recovery can be had for damages because of injuries suffered by the child.

P. Montfort, etc., vs. D. Schmidt, p. 750.

The administration of justice requires that the testimony of witnesses be unrestrained by liability to litigation on account of their statements in that capacity. Their declarations are protected by the occasion, and cannot serve as the foundation for a civil action when they are pertinent and material.

Statements made by witnesses in an *affidavit* before a court of competent jurisdiction, in a criminal proceeding, to support a motion for a new trial, based on the averments of newly discovered evidence, are privileged if applicable, pertinent and material to the subject before the court and do not expose the witnesses to an action in damages, even when the same prove false and malicious.

W. J. Burke vs P. Ryan, et al., p. 951.

DAMAGES—Continued.

Where a person with his horse and wagon is employed by another to perform services for the latter at a fixed wage of so much per week and certain additional commissions, the payment of wages establishes the relation of master and servant, implies subjection of the latter to the control and direction of the former, and gives rise to the responsibility of the master for the servant's negligent injuries in the course of his employment.

Where the servant who is employed to peddle goods for the master in a horse and wagon is driving to the latter's store to get goods, such driving is in the discharge of his duty and in the course of his employment, though he then had none of the master's goods in his wagon; and injury inflicted by negligent driving is subject to a rule of *respondet superior*.

The defense of contributory negligence on the part of the injured plaintiff is not sustained by the proof, and the damages allowed is not excessive. *John Shea vs. E. S. Reems, p. 966.*

DIVORCE.

The Supreme Court has jurisdiction of an action for the nullity of a judgment of divorce, although no pecuniary amount is in dispute.

A judgment of divorce obtained by one of the spouses against the other, who is absent from the State, will be annulled if the party who has obtained it has used fraud or ill practices.

M. L. Bryant vs. Austin, Ex'or., p. 808.

The fact that a husband, who has obtained a judgment of separation from bed and board against his wife, continues to occupy the same house as his wife, but separate apartments, while he is preparing a new home to which he moves alone as soon as it is ready, will not be construed as a reconciliation under the Civil Code.

Those circumstances will not bar his right to a divorce one year after the rendition of the judgment of separation.

J. Jacobs vs. D. Tobelman, p. 842.

EVIDENCE.

Even parties to authentic acts and their privies have the right to contradict recitals therein by an appeal to the conscience of opposing party by means of interrogatories on facts and articles; and answers to such interrogatories confessing the falsity of such recitals are not parol evidence and have all the effect of a counter-letter.

Widow Shelly et al. vs. M. Shelly, Sr., p. 100.

In a suit by the payee of a check against the drawer, notice of presentment and of dishonor may be oral and verbal, but it must be proved.

EVIDENCE—Continued.

Presumptions and beliefs that such notices were given will not suffice. There must be certainty and exactitude of proof that they were given.

Mechanics and Traders' Insurance Co. vs. Temple S. Coons, p. 271.

Where an act under private signature has been recorded upon due proof of its execution, and the original has been withdrawn from the Recorder's office by the party to whom it belongs, a third person wishing to make it available against such party may introduce in evidence a copy of such record. It is the best evidence attainable by him.

F. M. Hotard et al. vs. Railroad Co., p. 450.

Parol evidence is admissible between the parties to show error in an act of mortgage. Hence, it will be competent for a mortgage to prove by parol evidence that there is an error in the act which restricts his mortgage to one-half of a piece of property, and that the real contract was that his mortgage should affect or cover the whole of the property.

J. S. Armstrong vs. H. A. Armstrong, p. 549.

When the evidence in the record satisfies us that the omission of the endorsement on a draft offered in evidence was merely a clerical error, and when the evidence otherwise sufficiently establishes the endorsement, the omission will furnish no ground of reversal.

J. E. Thompson vs. Muller Bros., p. 728.

A litigant who fails to produce proof within his reach creates a presumption that it would be prejudicial to his case, and this presumption is strengthened when the evidence is in his possession and has been called for by his adversary by a demand upon him to produce it.

Crescent City Ice Co. vs. A. Ermann, p. 341.

EXECUTION.

Property in the possession of the sheriff under a legal writ at the instance of a judgment and privileged creditor cannot be seized and sold to the injury and detriment of such creditor. All that can be seized are the rights and interest of the debtor subject to the pre-existing execution.

The purchaser of such rights cannot as such enjoin and restrain the previous execution.

W. G. Henry vs. P. Tricou, p. 519.

The assignee, as a general rule, can acquire no greater rights than his assignor, and is bound by estoppels which were binding on the latter.

Where property is leased or rented the Code of Practice forbids the sheriff, in levying execution, from taking possession. In such case actual seizure is not essential, but notice of seizure is sufficient.

Failure to collect rents during seizure may render sheriff liable to seizing creditor, but does not invalidate the seizure.

Mrs. M. T. Pitkin vs. Sheriff et als., p. 781.

EXECUTION—*Continued.*

Where a party is in possession under a tax title, *prima facie* valid, a seizure cannot be legally made of the property by other parties enforcing claims against former owners. A direct action must first be resorted to to annul the title.

J. Gerac et al. vs. U. A. Guilbeau et als., p. 843.

A sheriff cannot be held responsible for refusing to collect the rents of real property under seizure, where the third party in possession claims to be the owner under a recorded title, where he is refused an indemnity bond and where it is decided that such third party was really the legal owner of the property. He fulfilled his duty by registering the seizure. By acting as required, he might have exposed himself to damages.

White, Richards & Co. vs. Sheriff et als., p. 984.

EXECUTORY PROCESS.

In the proceeding by executory process, the order of seizure and sale must be supported by authentic evidences exclusively.

Hence, the order issued in favor of a holder of a note made payable to the endorser and transferred by the latter, by blank endorsement, will be set aside in the absence of authentic evidence of such transfer.

Aliter if the notarial act recites that the note was made to the order of the drawer and by him endorsed in blank, in which case the note becomes payable to bearer.

Miller, Lyon & Co. vs. T. Cappel et al., p. 264.

EXPROPRIATION.

In proceedings by a railroad company for the forced expropriation of lands for the construction of its road, the test of the value of the lands is their market value as shown by the evidence. The assessment of a plantation of several hundred acres of land, among which is a large proportion of swamp lands, at an average price per acre, by the owner, will not estop him from proving a higher value of that portion of his lands which the railroad company proposes to use.

The railroad company is responsible for all impediments to drainage and to the system of cultivation which the location of the road causes to the owner of the expropriated and contiguous lands. *Vicksburg, Shreveport and Pacific R. R. Co. vs. Dillard; Bourdier & Belliesen vs. Morgan R. R. Co. Affirmed.*

Railway Company vs. G. M. Murrell, p. 344.

EXPROPRIATION—Continued.

The right to build branch roads and to expropriate for the purpose, conferred by a charter to a railroad company, is embraced within the title of its charter, which reads: "An Act to incorporate the Mississippi, Terre-aux-Bœufs and Lake Borgne Railroad Company, and to define its powers and authority."

The expropriated owner, through whose land the road is built, has a right of passage across it to go from one part to another.

Where such owner has failed to adduce sufficient evidence in support of his claim for damages, his right to assert and prove such should be reserved.

Railroad Company vs. L. H. Wooten, p. 441.

HABEAS CORPUS.

A party in actual custody under a charge of manslaughter, a bailable offense, is entitled to proceed by writ of *habeas corpus* before the Supreme Court or any of its judges for the purpose of being admitted to bail, provided he show that the judge of the district court of the parish in which he is held is absent from the State.

The State ex rel. Condon vs. Sheriff, p. 855.

HUSBAND AND WIFE.

The wife is bound to live with her husband and to follow him wherever he chooses to reside, C. C. Art. 120.

If, therefore, the husband decides to change the matrimonial domicile from one place to another, for reasons of his own, the wife must follow him to his new abode. Her refusal, without lawful cause, will be construed as an abandonment within the meaning of the law, and will justify his demand for a judgment ordering her to comply with his request.

The facts that he is poor, with a scanty means to supply her wants and tastes, that he has an irascible temper, a cool and distant disposition, has treated her harshly, in consequence of which they had been previously separated, do not operate a lawful cause for such refusal, when it appears that they had been reconciled and had exchanged pardon.

Pending the litigation, the father is entitled to the legal custody of the child, unless strong reasons exist to the contrary.

J. W. Gahn vs. E. Darby, his wife, p. 70.

In a suit for separation of property and dissolution of the community, brought by the wife against her husband, who has made a surrender under the State insolvent laws, and accompanied by a moneyed demand, the syndic of the insolvent was properly joined as co-defendant in the suit.

HUSBAND AND WIFE—*Continued.*

The syndic, as the representative of the insolvent's creditors in such case, could interpose any defense that the individual creditors might do by intervention in a suit of the kind where there had been no insolvent proceeding.

So, where the existence of the wife's mortgage was denied and the want of proper registry averred, the wife to have her debt placed as a mortgage debt on the bilan of the insolvent husband, must prove her debt and that the evidence of it was properly inscribed in the parish where the immovables were situated, sought to be affected by the mortgage.

Where a wife claims from her husband moneys, collected by him on promissory notes, purporting to have been given her by her father, the creditors of the husband cannot question the validity of the gift; it is enough that the husband received the moneys under color of the wife's rights and for her and her benefit.

A failure to record the wife's mortgage against her husband prior to first of January, 1870, did not destroy the mortgage, but its effect against third persons would only begin from the date of its subsequent inscription.

Mrs. N. A. Scheen vs. Chaffe, syndic, et al., 217.

Cruel excesses of the husband toward his wife, consisting in abusing, cursing and striking her, refusing her food and subsistence, medicine and medical aid during her sickness, when shown to be able, with sufficient means to furnish the same, are causes which entitle the wife to a separation from bed and board.

M. Moclair vs. J. Leahy, p. 583.

The wife who has obtained an order of court assigning her a domicile during the pendency of her action for separation from bed and board, is not amenable to the legal consequences of the refusal of a wife to obey the three reiterated summonses issued to her at the instance of the husband, during the pendency of the suit, under the provisions of Arts. 143, 144 and 145 of the Civil Code. In such a case, her refusal to return to the matrimonial domicile is for a lawful cause, and is amply justified by the order of the court which assigned her a special domicile during the litigation. The fact that she changed such domicile cannot defeat or suspend her action, unless such change is shown under an issue specially raised contradictorily with her, as directed by Art. 147, Civil Code.

Mrs. B. Jolly, etc., vs. Weber, husband, p. 676.

HUSBAND AND WIFE—*Continued.*

Where an immovable has been donated to a wife by her parents by a private act, defective in form, that defect may be ratified and confirmed by subsequent acts on the part of the heirs of the donors, such as we think are established in this case; but, in any event, the husband who has held the property as the paraphernal estate of his wife and as her agent, cannot raise objections to her title or make his possession the basis of a prescriptive title. His heirs and creditors have no greater rights.

M. J. Lemmon et al., vs. Clark, administrator, et al., p. 744.

The admission of a husband that the purchase of property made in the name of his wife, is for her separate benefit, that the price was paid by her out of her individual funds, concludes him, though it may not his forced heirs or creditors.

Property acquired by the husband during the community, with his own funds, without stating in the act of purchase that the same is made for his personal advantage and that the same is paid out of his personal means, falls into the community, the husband remaining a creditor of the same for the amount invested.

Judgment cannot be rendered for a claim, in the absence of issue joined.

C. M. Moore, tutor, vs. J. C. Stancel, p. 879.

Where a community of acquets exist between husband and wife, and the husband cultivates a plantation that belongs to the wife, the debts incurred by such cultivation are the husband's and cannot be enforced against the wife's property.

Even though the wife has signed lien contracts in favour of a factor for supplies and advances, if the fact be that she has not the administration of her separate property, but the husband does administer it as head of the community, he alone is responsible for the supplies and advances.

And if the debt that is contracted is put in the form of a note which is signed by the husband and wife, she will not be bound thereby.

J. Chaffe & Sons vs. M. E. McIntosh, et al., p. 824.

Interest on moneys of the wife received and expended by the husband can be allowed only from his death, when the claim is set up against his succession.

Succession of S. J. Weldon, p. 851.

INJUNCTION.

Injunction will not lie to restrain executory process for want of authentic evidence of the endorsement of the notes. The remedy in that case is by appeal from the order of seizure and sale.

INJUNCTION—*Continued.*

Where the injunction is by the maker and endorser of the mortgage notes, and he alleges, admits, and swears that he did sign and endorse them, and recites that the act of mortgage expressly enures to the benefit of any future holder of them, it does not lie in his mouth to set up that the endorsement of the notes has not been proved by authentic act.

J. Chaffe & Sons vs. W. DuBose, p. 257.

A preliminary injunction can issue to *maintain* a plaintiff in possession, but should not be allowed to *oust* one in possession of property.

Railroad Company vs. Railroad Company, p. 561.

Where from the allegations of the plaintiff it appears that the apprehended injury is compensable by money, and the bond for the dissolution of the injunction covers the sum fixed by the plaintiff as damages, no appeal will lie from the order of dissolution.

E. Irwin vs. Telephone Company, p. 772.

Where the plaintiff in an injunction alleges that the acts complained of will cause him an irreparable injury, and the facts set forth in the petition fully confirm such averment, the judge is without authority or discretion to dissolve the injunction on bond.

And though the motion to dissolve denies the alleged injury and sets up matters that justify the acts enjoined, and evidence is offered to establish the same, such evidence on the trial of the motion is not admissible. It constitutes a defense to the action, and such defense and the evidence to support it must be deferred to the trial on the merits and cannot be allowed at the preliminary stage of the cause.

Water Works Co. vs. J. Oser & Co., p. 918.

Where, upon petition, affidavit and bond, a court has issued its injunction restraining the doing of a certain act until its further orders, without other restriction as to time, the injunction operates under modified or discharged by order of the court.

The party enjoined is not justified in disobeying the injunction on the ground that it was not authorized by the allegations of the petition. Such an injunction having been asked in the prayer of the petition, the question whether it was sustained by the allegations thereof was one proper and essential to be decided by the judge at the time of granting or refusing the writ, in the exercise of acknowledged jurisdiction and unquestioned power; and mere error therein, even if it exist, did not authorize a disobedience of the order of the court. Such disobedience was properly punished as a contempt.

INJUNCTION—*Continued.*

There being no question as to the jurisdiction of the court, as to its power to issue an injunction of the kind, or as to the regularity of the proceedings, the relator is entitled to no relief under writs of prohibition and certiorari.

The State ex rel. Water Works Co. vs. Lery et al. p. 941.

INSANITY.

The opinions of witnesses who are not physicians or experts in matters of insanity, touching the condition of the mind of a human being, are entitled to little or no weight as evidence in a trial involving the alleged insanity of a person.

Such witnesses should state facts and incidents in the life and conduct of the party, from which the court alone is authorized to draw inferences and legal deductions touching the true condition of the mind of the person on trial for interdiction.

Great weight and legal effect will be given to the opinion and report of physicians and experts appointed to inquire into the condition of the party.

Widow P. Eloi vs. V. Eloi, p. 563.

INSOLVENCY.

In proceedings for forced surrender on a petition setting forth all the requirements of Section 1781 R. S., it is not error for the judge to make his order *ex parte* commanding the defendant to file a schedule of his creditors.

If after such order the defendant, by rule or exception, traverses the truth of the allegations of the petition, he must make at least a beginning of proof, in order to throw on plaintiff the burden of establishing his allegations, which, upon the affidavit to the petition are to be taken as *prima facie* true.

J. E. Thompson vs. Muller Bros., p. 728.

INSURANCE.

Stipulations in policies of insurance limiting the time within which claims shall be prosecuted are valid and legal, and form the law for the parties.

When, on presentation of a claim for loss, a company positively denies its legal liability, but says that being re-insured for seven-eighths of the loss in other companies, it is willing to pay if the re-insuring companies will also consent; and when the re-insuring companies have not consented; and when all negotiations have ended and the company has absolutely refused to pay nearly two months before the expiration of the period limited in the policy for the prosecution of the claim, such negotiations form no excuse for

INSURANCE—Continued.

delay beyond the term, and action brought six months after the expiration is barred under the stipulation.

An open policy insuring the freight lists of steamboats plying the Mississippi and tributaries, upon proper and timely entries thereon, unmistakably mean that if by reason of any of the perils insured against, the boat should be prevented from earning the freight stipulated on cargo shipped, the company will make it good to the extent of the insurance. When by reason of such peril the boat is disabled from completing her voyage and is compelled to reship her freight at the same rate which she was to receive, the loss is total and the company liable.

F. A. Blanks vs. Insurance Company, p. 599.

Where there is not a condition in the policy of insurance requiring the true title of the insured to be stated, and there has been a misrepresentation of interest, that misrepresentation will not be fatal to the policy if knowledge of the true ownership of the property would not have enhanced the premium or have deterred the underwriter from taking the risk at all.

But when the policy contains the condition requiring the true title to be set forth, failure to comply with it vitiates the policy.

V. Adema vs. Insurance Company, p. 660.

Where the lessee of a plantation builds a ginhouse upon it under an agreement with his lessor that the latter shall buy the ginhouse and its appurtenances at the close of the lease at a price to be then agreed on, the lessee is owner of the ginhouse and has an insurable interest therein, and will recover on a policy therefor, the fire having occurred during the lease.

Allen, West & Bush vs. Insurance Company, p. 767.

INTERDICTION.

Interdicted persons are, in every respect, subjected to the same rules and protected by the same laws which govern minors.

The curator of an interdicted person cannot incur expenses for the support and maintenance of his ward in excess of the latter's revenues. Such expenditures, unless authorized by a family meeting, are at the risk of the curator, who, in his final account, will be held liable for the capital, intact, of the interdict's estate.

The account of a curator is due to the court, and his omission, to make the heirs of the interdict parties to the proceeding will not debar the latter of their right to oppose his account.

Succession of M. Webre, p. 312.

INTERVENTION.

Before dismissing a suit by consent of parties thereto, one asserting an interest in the matters involved in the suit should not be denied the right to intervene therein and file his petition of intervention, subject to the right of either party to suit, to cause the dismissal of the intervention by the proper exception. A delay of fifteen minutes asked for to procure the petition of intervention already prepared should have been granted.

J. S. Ikerd vs. Mrs. Postlewhaite et al., p. 236.

JUDGMENT.

The appellate court does not sit to revise the reasons assigned by the judge of the lower court in support of a judgment which is affirmed. It surely cannot do so where the reasons were "*orally assigned*," and therefore do not come up with the transcript. This court reviews and passes upon the correctness of the judgment appealed from. The reasons assigned by it for the affirmance of such judgment are to be taken as those justifying the judgment of the lower court.

Where the lower court orders, without giving written reasons, the delivery to a surviving wife in community, of the legacies made to her by her deceased husband, of property once forming part of the community assets, and this court, affirming that judgment, decides that the bequests made consist of the half of the deceased in such property, the reasons of this court must be deemed as those which were or should have been given by the court of first instance.

Succession of John Geddes, p. 53.

The decretal part of a judgment rendered by the Supreme Court, and not the opinion or the reasons, afford the proper test to ascertain the matters which become *res adjudicata* under the decree.

An order or judgment rescinding an order of appeal previously obtained by a party to a suit will be annulled and set aside if it appears that the rescinding order was rendered after the death of the party who had obtained the appeal.

The latter's administrator is competent to prosecute an appeal from such a judgment.

Succession of P. Hoggatt, p. 337.

Only absolute nullities in the original judgment can be opposed to its revival; and as a general rule, such nullities must appear on the face of the proceedings.

Where a suit is instituted in one parish, it may by consent of parties be transferred to another; and if such latter court has jurisdiction over the subject-matter, the judgment rendered therein, if not otherwise void, will be valid.

JUDGMENT—*Continued.*

If the party to a suit dies during its pendency in the Supreme Court and his legal representatives are then made parties, and the case is remanded to the lower court for another trial, and at this trial the same counsel appear for such representatives and another judgment is rendered in said court and is again appealed to the Supreme Court, and the bond of appeal is signed by said representatives of the deceased litigant, the judgment appealed from and that rendered on said appeal will not be absolutely null by reason of the failure to suggest in the lower court the death of the litigant and to enter on the minutes the appearance of his representatives.

The discharge of the judgment debtor in bankruptcy cannot be successfully opposed to the action of revival, and his assignee is the proper party against whom the proceeding should be conducted.

W. and H. Stackhouse vs. J. E. Zuntz, p. 529.

Non-residents of the State cannot be legally represented by a curator *ad hoc* in a personal action against them, unless property of theirs has been subjected to the process of the court or actual service has been made upon them. The appointment of a curator *ad hoc* to them in such a case is unavailing.

Judgment cannot be rendered against a party who is not mentioned in the proceeding and who has not joined issue or made himself party.

A mere citation served on such party does not compel appearance or justify judgment in default.

Defenses not justified by the answer and made in oral or printed argument, do not constitute issues and are not entitled to be passed upon.

One not a party to a proceeding cannot on appeal ask an amendment of a judgment which cannot affect him.

Mrs. L. C. Bracey et al. vs. Mrs. Calderwood et al., p. 796.

Where a new trial has been prayed as to certain specified parts or features of a judgment has been granted, had, and another judgment rendered as to such parts, the judgment so far as uncomplained of will not be reviewed in this court.

J. Cerae vs. W. A. Guilbeau et als., p. 843.

JUDICIAL SALES.

The purchase of an heir's interest may be assimilated to that of a hope.

If the interest realizes less than was expected, or nothing, the purchaser is none the less bound for the price.

The purchaser of such interest in successions composed in part of real estate at a judicial sale made thereof at his instance, as a judgment creditor of such heir, is bound to pay to the sheriff so much

JUDICIAL SALES—*Continued.*

of the amount of adjudication as may be required to meet judicial mortgages registered previous to his own, when the creditors under such mortgages have filed a third opposition asserting their rights claiming a preference and asking that the proceeds of sale be returned and where the order of court made in pursuance were served on or service accepted by the sheriff before the time of sale.

Where the purchaser does not comply and pay, the sheriff should resell on the spot.

If the sheriff does not resell and permit the adjudicatee to retain, and loss ensues, he can be held responsible to the extent of the loss.

Whatever the law be regarding the right of purchasers to retain the price of adjudication at judicial sales, to meet anterior privileges, special or other mortgages, it does not apply to a case like the present one in which the antecedent creditors step in and ask payment, the court orders the sheriff to retain the proceeds and the opposition and order reach the sheriff before the sale is actually made.

Where the service is accepted on the day of sale, the presumption is, in the absence of plea and proof to the contrary, that this was done prior to the time of sale.

L. Dobard vs. C. Bayhi, p. 134.

The mortgages in existence against heirs at the time of the opening of a succession in their favor, are no impediment to the sale, free from the same, of real property judicially ordered to be sold to pay the debts of such succession, under regular administration. The creditors are referred to the proceeds.

Evidence of the existence of such mortgages in favor of minors is properly excluded on a note against a purchaser to compel compliance with the adjudication made to him of such property.

Where the title tendered is free from any incumbrance and otherwise such as the adjudicatee is bound to accept, the judgment ordering compliance will not be disturbed.

Succession of H. Escarraquell, p. 155.

A sale of succession property made under an order of court to pay debts on the application of creditors, is a judicial sale.

The purchaser at such a sale, when it appears that the court was of competent jurisdiction, is not bound to look beyond the decree recognizing its necessity.

Succession of E. P. Macias, p. 444.

JUDICIAL SALES—*Continued.*

Defendants' title under a judicial sale is attacked by plaintiff on sundry grounds :

1. It is charged that the sheriff who made the sale was one of the purchasers thereat. The evidence negatives the charge.
2. That the sheriff's deed to the purchasers is not in the form prescribed by law. The adjudication was sufficient to convey the title.
3. That there was no seizure of the property. The sheriff did seize, but as the property was only an undivided half-interest, the whole of which was owned and possessed by plaintiff, he did not maintain a keeper. He could not take physical possession or divest plaintiff's possession which was *per my and per tout*. Moreover, plaintiff was represented at the sale by her attorney, who took part in the bidding and offered in her behalf to take defendants' purchase and furnish the twelve months' bond, and no objection was urged on ground of defective seizure. She is estopped.
4. That there was no legal appraisalment. The same estoppel applies and, besides, the appraisalment was legal.
5. That the defendants failed to comply with adjudication by furnishing a valid twelve months' bond. In this matter plaintiff has no interest.
6. That the bid did not exceed the prior special mortgages on the property. The mortgage certificate did not show any prior special mortgage. Plaintiff, who was only a third possessor, is incompetent to raise questions involving the existence, record and rank of an alleged mortgage, which we cannot decide in absence of the creditor of that mortgage.
7. That the thing sold was a litigious right and that one of the purchasers was a deputy clerk of the court. So far as the *title* is concerned there was no litigious right involved. As to the litigated encumbrance by the alleged mortgage above referred to, that can only be opposed by the encumbrancer.

A defendant in writ is not permitted to attack the sale of his property thereunder, on the ground that the price of adjudication is not in excess of an anterior conventional encumbrance, where the creditors, in whose favor it exists, has filed a third opposition, claiming to be paid out of the proceeds of sale.

M. A. Lane vs. R. S. Cameron et al., p. 773.

JURISDICTION.

In an injunction suit to restrain the tax collector from proceeding in a sale for taxes, when the validity of the assessment and taxes has been sustained by a prior judgment which has become *res adjudicata*, the tax debtor stands in the position of a judgment debtor and the test of our jurisdiction, is the amount of the tax claim, exclusive of interest.

W. H. Aymar vs. Bourgeois, sheriff, etc., p. 392.

Where plaintiff sues for \$748 31 and defendant reconvenes for \$784 57, neither claim is within our jurisdiction. In this case, after answer filed to original demand, plaintiff filed an amended petition claiming \$259 additional, but this claim was never put at issue by answer or default. It moreover appears from plaintiff's pleadings that he judicially admitted that his original claim should be reduced to \$148 31, which would exclude our jurisdiction, even if we entertained the amended petition.

Zuberbier & Behan vs. Mrs. Robin & Son, p. 418.

In a proceeding for a mandamus to compel the recorder of mortgages to cancel the inscription of tax mortgages, like in all other controversies, the test of the jurisdiction of the Supreme Court is to be found in the real amount in dispute, exclusive of interest. If the amount in capital of the taxes sought to be cancelled does not exceed \$1000, the Supreme Court is without jurisdiction.

Although accrued interests are likewise secured by the mortgages, they are not a component part of the matters in dispute within the meaning of the Constitution.

G. A. Breaux, et al., vs Recorder, etc., p. 742.

In an action for partition of property held in indivision, the jurisdiction of this Court must be tested under the same rules which govern in succession matters. The jurisdiction of this Court depends upon the amount of the fund to be distributed, and not upon the amount claimed therein.

In this case the amount of the inventory is less than \$2000; and the fact that appellant claims \$5000 against the community, cannot vest jurisdiction in the Supreme Court.

M. V. Gray vs. S. Gray, p. 868.

In a revocatory action the test of the jurisdiction of the Supreme Court is in the amount claimed of the original debtor, and not in the value of the property the sale of which is sought to be revoked.

The judgment, if the action is maintained, is that the contract is avoided only as to its effect on the complaining creditor. As to third persons it remains in full force. *Lobe & Bloom vs. Arent*, 33 Ann. 1086. Affirmed.

Zuberbier & Behan vs. R. S. Morse, et als., p. 970.

LEASE.

The joint owner of movable property can make a valid lease of the same, when authorized thereto by his co-owners.

In case that one of the co-owners does not participate in authorizing the lease, his subsequent ratification of the same gives full validity to the contract.

A lessee of movable property cannot be legally divested of his possessions of the thing leased, by means of a sale of the same by the lessor to a third party. *J. Hardy vs. J. H. Lemons, p. 146.*

Where a contract stipulates, in substance, that one of the parties may remain on and cultivate a plantation named therein, and pay annually for certain designated years, *in lieu* of rent, a sum equal to the interest on the property, the obligee may recover said amount, but is not entitled to the lessor's privilege.

The determination of the question of the obligor's liability therefor, does not necessarily involve the determination as to the character of the entire contract, or whether it is a *vente à réméré* or a common law mortgage. *J. Friedler vs. Mrs. S. M. Chotard, p. 276.*

In a contract of employment for one year at a stipulated annual compensation, an express proviso reserving to the employer the right to discharge at any time, if dissatisfied with the manner in which the employee performs his duties, is a valid and legal agreement which the courts must enforce.

The employer has no right to discharge, prior to the end of the term, for any other cause than because he is *dissatisfied*; and if it appears that the discharge was for other cause, as for instance, because his services were no longer needed in the business, or because the employer wished to reduce the number of his employees, or the like, and that the alleged dissatisfaction was a mere pretext, we should hold the employer responsible.

But, in this case, the evidence satisfies us that the *dissatisfaction* was the true cause of the discharge and this exempts the employer from responsibility. *B. B. Hotchkiss vs. Gretna Company, p. 517.*

Where a person is employed at \$1800 *per year*, and after he has notified his employers that he would make no engagement for less than a year, and for one year renders the services stipulated without complaint, and at the end of the year is not discharged, but continues to attend to the business as before, with the knowledge and apparent sanction of the employer, and at the end of a few months in the second year is discharged without cause, he will be entitled to recover the entire salary for the second year. The contract was a continuing contract by the year, subject to be terminated at the end of each year by the wish of one or both parties thereto.

C. A. Alba vs. D. Moriarty & Co., p. 680.

LEASE—Continued.

The lessee of a sugar plantation has the right to remove all the improvements and additions which he has made thereon, provided he leaves it in the state in which he received it.

If the lessee agrees in the contract of lease that all machinery and fixtures put on the property by him shall remain thereon at the expiration of the lease, he loses his right to remove such improvements, but he does not thereby waive his right to claim compensation therefor. Such compensation is the actual cost of the machinery and fixtures. *J. W. Ross vs. J. E. Zuntz, p. 888.*

Plaintiffs, the lessees of the wharves and landings, were under no obligation as such lessees to reconstruct and rebuild the levees fronting on the river and the bulkheads destroyed by a storm of extraordinary violence. And where the city contracted with said lessees independently of said lease and without reference to do said work under the lease, it must pay for it.

Eager, Ellerman & Co. vs. New Orleans, p. 933.

LEGACY.

A fund bequeathed to a charitable institution of New Orleans, which is under the administration of the City Council, cannot be diverted by the Council to another institution under the administration of a State Board.

A bequest to the City Insane Asylum, wherein the insane of the city alone are cared for, cannot be expended for the benefit of the State Asylum, wherein the insane of the whole State are cared for, even though the city insane have been removed from the local asylum to that of the State.

Quære:—whether the City Council may not receive and administer the bequest for the city insane who are confined in the State Asylum.

Succession of Mrs. E. Vance, p. 559.

LEVEES.

Act 104 of 1882 and Act 88 of 1880, which is amended, refer not only to levees kept by the State, but also to district or parish levees kept otherwise, which are designed to protect the public from overflows from the Mississippi river.

Police juries have the right to make such regulations, not already provided for by law, as may be necessary to carry out fully the provisions of the statutes on the subject, subordinate to the disapproval of the Board of State Engineers, whose authority, in case of a conflict, must prevail.

LEVEES—*Continued.*

A party who has not obtained the prescribed permission of the police jury, or, who having obtained it, has not paid the required license, has no right to cut such levees and place and use flumes therein for the purpose of irrigating his fields.

Booksh and Gay vs. J. A. Dardenne et al., p. 342.

LIBEL.

One who habitually libels others complains with bad grace of being himself libelled, and therefore where two parties engage in a newspaper controversy, and hurl abusive epithets at each other, they are both in the wrong, and neither can recover damages from the other.

Editors of newspapers, and writers for them, have no peculiar rights or privileges in this respect, and have no more claims to indulgence than others. They are held to the same responsibility with any other person, and malice on their part is conclusively inferred if the publication is false.

The law gives no countenance to the proposition that immunity can be claimed by an editor or publisher of a newspaper, if he shall pamper a depraved public appetite by the publication of falsehoods and calumnies upon private character, nor does it give encouragement to the circulation of defamatory publications by protecting the retailers of them. It protects the character of a man as studiously as it protects his property.

One, who is himself in fault, cannot recover damages from another who has retaliated in kind, although the latter was not justifiable in law, and this holds good in spite of the truism that one wrong does not justify another.

M. F. Bigney vs. W. Van Benthuyzen et al., p. 38.

In an action for damages, alleged to have been suffered from the publication of a libel, where the published matter appears not to be a libel, but a privileged communication, no damages can be awarded.

M. Dunsee & Co. vs. A. Norden & Co., p. 78.

In prosecutions for libel, proof of publication, libellous and unauthorized on its face, makes out a *prima facie* case for the State and establishes a legal presumption of malice. The burden of establishing justification is then thrown upon defendant.

If the publication be not *privileged*, justification can only result from proof, both that the matter charged was true and that the publication was made with good motives and justifiable ends.

LIBEL—*Continued.*

Article 168 of the Constitution is not inconsistent with, and does not repeal section 3641, Revised Statutes.

Belief in the truth of libellous matter charged, when not privileged, is no justification when the charge is actually false.

The action of a member of a congregation in publishing to all the world a libel concerning his minister or priest is not privileged—however, it might be with like communication addressed to the church authorities. *The State vs D. Bienvenu et als*, p. 378.

A libel is any publication whether in writing, print, picture, effigy, or other fixed representation to the eye, which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation.

Publication is the communication of the libel or defamatory matter to a third person.

Every sale or delivery of a written or printed copy of a libel is a fresh publication, and every person who sells a written or printed copy of it may be sued therefor, and the onus of proving that he was ignorant of its contents is on the defendant. In giving currency to slanderous and libellous reports and publications, a party is as much responsible criminally and civilly as if he had originated the defamation. His only defence to a civil suit is to shew the truth of the charges preferred, while in a criminal prosecution not only must the truth be proved, but that the truth was published for good motives and for justifiable ends.

The word 'malice' in such cases does not imply, much less mean, ill will or personal malice. Malice is an imputation of the law from the false and slanderous nature of the charge. Legal malice need not be proved. Actual malice may be proved to enhance the damages.

Any publication which is false and defamatory subjects the publisher and the seller to damages in favour of the party aggrieved, and it is not incumbent upon him to prove that he has been injured by the publication.

The discharge of one who has been prosecuted for libel does not prove want of probable cause for the prosecution, nor malice in the prosecutor. *C. E. Staub vs. W. Van Benthuyzen*, p. 467.

LITIGIOUS RIGHTS.

A judgment in litigation, under an action in nullity, is a litigious right.

The transfer of a portion of such a judgment by the owner thereof to his attorney, in part payment of fees due to the latter in the case, is a giving in payment within the meaning of Article 2655 Civil Code, and it thus presents the purchase by the attorney of a litigious right falling under the prohibition of Article 2447 of the Civil Code.

Buck & Beauchamp vs. Blair & Buck, p. 16.

The rule which strikes with nullity the purchases by attorneys-at-law of litigious rights which fall under the jurisdiction of the tribunal in which they practice, will imply to purchases made by attorneys who reside in a different parish or district from that in which sits the court in which the suit originated. The fact that the attorney has never practiced in that particular court will not shield him.

A. Denny vs. R. K. Anderson, p. 762.

MANDAMUS.

On an application for a *mandamus* the ruling of a district judge referring exceptions to the merits, cannot be reviewed.

The writ issues to proceed, not to recede; to do, not to undo.

The judge is vested with a legal discretion and he has exercised it.

His action can cause the exceptors no irreparable injury, as it can be revised by himself, before the final determination of the suit, or on appeal by this Court, which, if he have erred, will render such judgment as he *ought* to have pronounced.

The State ex rel. Bryant vs. Judge, etc., p. 112.

A *mandamus* does not lie to compel a district judge to rescind an order made by him dismissing an appeal because the surety is not good and solvent, as the law requires, although such surety may be such as meets the legal exigencies, and to reinstate the dismissed appeal although the judge may have erred. Such action on his part cannot be reviewed in a proceeding for a *mandamus*, and can be considered only in a different proceeding specially provided and sanctioned for such cases.

The State ex rel. Menge vs. Judge, etc., p. 200.

A *mandamus* lies to compel the granting of a suspensive appeal from a judgment ordering the ejectment of a person and property from premises which such person claims the right to occupy under a written lease, where the application for the appeal is seasonable and accompanied by a proper bond, and the execution of the judgment would inflict irreparable injury, exceeding one thousand dollars.

MANDAMUS—*Continued.*

The right of appeal is a constitutional one and cannot be abridged, whatever the effects may be which the enforcement of the same may occasion.

Ejectment judgments are not among those enumerated by law, in which a suspensive appeal does not lie.

The State ex rel. M. Johnson vs. Judge, etc., p. 210.

A *mandamus* lies to compel the granting of a suspensive appeal from a judgment decreeing a liquidation of a community of acquets and gains, although it refuses a partition asked. Such judgment, having passed on the entire demand, is a *final* judgment, from which the law does not provide that there shall be allowed no appeal.

The State ex rel. Geddes vs. Judge, etc., p. 301.

While the range of cases in which writs of *mandamus* may be issued is enlarged by the grant of supervisory power over inferior courts, it does not follow that that writ may be invoked always instead of an appeal. It would revolutionize our jurisprudence to hold that every right that was formerly enforced by appeal and every wrong that was formerly redressed by appeal can now be enforced by *mandamus* when an emergency seems to require or invite it.

A *mandamus* will not issue to compel an inferior judge to bond an injunction when he has refused to dissolve on bond. The remedy is by appeal. *The State ex rel. R. R. Co. vs. Judge, etc., p. 494.*

The ruling of a district judge refusing a preliminary injunction is reviewable on application for a *mandamus*.

A suspensive appeal from such ruling would afford no adequate relief.

In the exercise of the supervisory powers vested in this Court by the present Constitution, relief can be allowed in cases of denials of justice, in which, under previous Constitutions, none could be awarded.

A *mandamus* lies to compel a district judge to grant an injunction *in limine*, where a clear case is presented and the requirements of the law have been complied with and where injury would result were the apprehended act, sought to be prevented, not arrested.

The writ may issue at the discretion of the court where the law has assigned no adequate relief by the ordinary means and where justice and reason require that some mode should exist of redressing a wrong, or an abuse of any nature; also, even where a party has

MANDAMUS—*Continued.*

other means of relief, if the slowness of ordinary legal forms is likely to produce such a delay that the administration of justice may suffer.

The articles of the Code of Practice, dormant under previous Constitutions have been vivified by Article 90 of the present Constitution and serve as guides, in the exercise of the supervisory jurisdiction of this Court.

In a proper case, this Court may issue a restraining order which will produce the effect of the injunction asked, had it been granted.

There is no error in refusing an injunction where the facts alleged are insufficient, the petition disclosing no cause of action.

The State ex rel. Murray vs. Judge, etc., p. 578.

The dissolution of an injunction on bond amounts to authority to perform the prohibited act.

The execution of an interlocutory decree allowing the commission of an act which, if done, would occasion an irreparable injury—being susceptible of inflicting such irremediable wrong—can be suspended by appeal.

The determination of the right to such relief unavoidably involves an inquiry into the correctness of the decree. Recognition of the right to such appeal implies an erroneous ruling by the lower court.

A *mandamus* lies to compel the granting of a suspensive appeal from a dissolving order on bond, where the doing of the act might imperil the home, the health and the lives of the complainants.

The State ex rel. Bell vs. Judge, etc., p. 886.

The object of the writ of *mandamus* in our practice is to prevent a denial of justice or to avert the consequence of a defective remedy. It must be issued when there is no ordinary legal relief and justice requires that a mode of redressing the wrong shall be found. It may be issued even where there are other means of relief, if the ordinary legal forms will produce such delay that the public good will suffer or the administration of justice be hindered.

This writ has become the ordinary legal relief for a party who seeks to obtain the erasure of mortgages upon his property.

Where the proof is that the mortgage has been paid actually or legally, the writ will be made peremptory, and the court will order the erasure even though the State is holder of the mortgage or a beneficiary of it.

MANDAMUS—Continued.

The fact that the U. S. Court has taken cognizance of the liquidation of an association whose mortgages have perempted or been paid will not prevent the State court from ordering the erasure of such mortgages upon sufficient proof administered contradictorily with all parties interested.

G. A. Lanoux vs. Recorder Mortgages et als., p. 974.

A writ of mandamus will issue to compel the judge of the lower court to grant an appeal from a judgment rendered by him homologating the account of a receiver appointed under his authority to receive and account for the proceeds of the sale of succession property, preparatory to a judicial partition between the heirs of the succession.

Such a judgment, which determines the responsibility of the receiver, and fixes the basis of the partition, could not be reviewed in the partition proceedings, and would, if erroneous, work irreparable injury. It is, therefore, appealable.

The State ex rel. Hearsey vs. Judge, etc., p. 981.

MANDATE.

In the absence of sufficient proof to repel the presumption of the gratuity of services rendered in the execution of a mandate, courts are powerless to allow remuneration for such.

Specially will the same be denied where surrounding circumstances fortify that presumption. *Succession of J. B. Plotton, p. 211.*

A principal is bound to reimburse the expense and charges which his agent has incurred in the execution of the mandate, and pay his commission where one has been stipulated. Neither can he be dispensed therefrom, nor be permitted to reduce the amount to be reimbursed, under pretense that the charges ought to have been less, even if the affair has not succeeded, where no fault is imputed to the agent.

Adam Bros. vs. S. Oteri & Bro., p. 386.

The acts of an agent, even if unauthorized by his mandate, or in violation thereof, are considered as ratified by the principal by acquiescence if, after knowledge of the same, he does not repudiate them.

Hugh Allison & Co. vs. M. B. Watson, p. 616.

The mere relation of attorney and client does not, of itself, disable the attorney of a judgment creditor from buying on his own account at a sale in execution of the judgment, provided he act with perfect fairness and good faith, and in no manner in opposition to the interests of his client.

MANDATE—*Continued.*

When the attorney has so acted; when his client, though advised of the sale, has given no authority to buy; when the bid of the attorney was to the advantage of the client, because, but for it, the land would have been sold at a less price; and especially when, as in this case, the client having been offered the option of taking the land or the price, preferred and received the latter, he cannot, long afterwards, be permitted to assail the title of the attorney and demand to be substituted as owner under said title.

Hyams, Adm., vs. E. B. Herndon et al., p. 879.

Mandate or the contract of agency is provable by parol testimony.

Ten years is the prescription period for an action of mandate, or an action to compel an agent to account.

This prescription begins to run when a settlement has been demanded and refused, or in other words, when the agency has terminated.

L. A. Wall et al. vs. Colbert, Ex'or., p. 883.

MARITIME LAW.

Where suit is brought upon a contract of affreightment for a part of a ship's load, to be delivered on or about a given day, and the ship's arrival at port is delayed by an accident to her machinery so that the shipper has to employ another vessel, he will be released from his obligation to comply with the contract, unless he has voluntarily continued it, and has waived his right to a release by demanding compliance therewith by the ship.

Cgnie. Commerciale, etc., vs. Gomila & Co., p. 280.

The rule which requires vessels navigating the high seas to repair, if it can be done, and to prosecute the voyage without transferring freight, must submit to reasonable limitations in its application to river-craft, whose voyages are short and whose shippers have the right to require prompt forwarding of their goods in case of detention by accident. Under the circumstances here, the boat was justified in reshipping. *F. A. Blanks vs. Insurance Company, p. 599.*

MINORS.

The authority of a tutrix to sell movables of minor ward, under administration, must be exercised under judicial authorization and a public sale, Articles 338 and 341, Rev. C. C., being construed together. *C. M. Schiller vs. New Orleans City R. R. Co., p. 77.*

Where a minor has been emancipated under the provisions of article 385 of the Code, prescription against his right of action against his tutor for a settlement begins from the date of his emancipation and not from his majority. *Mrs. Proctor vs. Mrs. Hebert, Ex'ix., p. 250.*

MINORS—*Continued.*

A person who has been emancipated on his own petition by the decree of a competent court having jurisdiction over his person, correct in form, will be estopped from invoking the nullity of said judgment against third persons who have dealt with him as an emancipated minor.

In such cases, persons dealing with emancipated minors are not required to look beyond the decree.

Hugh Allison & Co. vs. M. B. Watson, p. 616.

When the tutrix of minor heirs, in her capacity as such, takes possession of and administers the estate of the deceased parent of the minors, without any appointment as administrator, such act is equivalent to the entering into possession of the beneficiary heirs. The tutrix officially represents them alone; her possession is their possession; her acts, within her lawful authority, are their acts. *Soye vs. Price, 30 Ann. 93.*

If the minor heirs are creditors of the estate of the parent they cannot, on coming of age, compete with other creditors, before accounting for the movable property and revenues of the estate which came into their possession through their tutrix and which, if consumed for their benefit, would extinguish their debt.

M. J. Lemmon et al. vs. Clark, Adm'r, et al., p. 744.

MONOPOLIES.

The constitutional prohibition of monopolies is absolute and effective, and therefore it abrogated the exclusive privilege of slaughtering animals for food, given by the legislature of 1869 to the Crescent City Stock Landing and Slaughterhouse Company, and invested the municipal authorities of the city with power to regulate the matter, subject to the approval of the Board of Health.

A slaughterhouse is *prima facie* a nuisance, and therefore until the municipal authorities regulated the location of such buildings by fixing the limits within which they should not be placed, no one could lawfully locate one within the city boundaries.

After those authorities had thus regulated the matter, a company may locate its abattoir and appurtenances in conformity thereto, and an injunction will not lie to restrain it in the absence of proof of nuisance.

S. Howell vs. Butchers' Union S. and L. S. Landing Co., p. 63.

MORTGAGE.

A mortgage creditor can proceed *via executiva* to enforce his claim, notwithstanding the death of the mortgagor, and even though the property is under administration.

If he does not thus proceed, the executor may obtain an order of sale in the mortuary proceedings as the representative of all of the creditors.

But the mortgage creditor cannot be forced to submit to a sale of fractional parts of the mortgaged property, nor can he be compelled to run the risk of diminishing its saleable value, by submitting to a sale in lots and on credit on the theory that, if sold piecemeal, the property will realize more than if sold in block and for cash.

If the executrix has been forced to give security for the mortgage debt at the instance of the party holding it, he is protected against all contingencies, and cannot complain if the sale proceeds under her order, where the terms and mode of sale have been changed to conform to his demands.

Walmsley, Executor, vs. Levy, Executrix, p. 226.

When there are two distinct immovables in a succession, both of which are subject to the same first mortgage, and each subject to different second mortgages, the administrator cannot, by provoking a sale of one immovable before the other, benefit the second mortgagees on the immovable unsold, to the prejudice of those on that sold, by the distribution of the entire price of the latter to the extinguishment of the first mortgage.

Although the right of the first mortgage creditor to take the proceeds is absolute, order will be made, when the other immovable shall be sold, to make such distribution of the proceeds thereof as will leave the respective second mortgage creditors in the same position as if both immovables had been sold and the proceeds of both marshaled for simultaneous distribution.

Succession of J. Anger, p. 252.

Under Section 2387 of the Revised Statutes of the United States, the entry of lands authorized to be made by the corporate authorities of towns "in trust for the several use and benefit of the occupants thereof," is made for the benefit of such occupants, and the title received is, in effect, the title of the occupants. Judicial and special mortgages granted by said occupants prior to the discovery of their defective title attach to the lands immediately on the entry. Where proceedings are in progress to enforce such mortgages, transfer by the occupant to a third person is unlawful under

MORTGAGE—Continued.

Act No. 3 of 1878, and cannot sustain a conveyance by the corporate authorities to such transferee, whose title will be annulled at suit of the occupant's mortgaged creditors.

Mrs. L. Mallard vs. T. C. Anderson et al, p. 834.

Where in an act of mortgage the property mortgaged is first described by legal sub-divisions and these sub-divisions are then declared to compose a certain plantation, giving the name thereof and otherwise sufficiently describing it apart from the sub-divisions mentioned, *held* that the mortgage rested on the plantation and that parol evidence was admissible to show that the description by the legal sub-divisions was erroneous and that said numbers did not, in whole or in part, compose the plantation.

W. L. Dickson vs. L. Dickson et al, p. 870.

MUNICIPAL CORPORATIONS.

Under the ordinance of the city of Baton Rouge, authorizing the prosecution and punishment of the owners of houses, after conviction of their tenants for keeping disorderly houses therein, and due notification thereof to such owners or their agents, no prosecution can be maintained against such owners, before conviction of their tenants and previous to notice of the same to them.

The council of a municipal corporation can provide modes of punishment of offenders against its police ordinances, by general ordinances affecting all persons alike, but it is powerless to single out any individual and denounce his trade, occupation or conduct.

Proceedings against offenders against municipal ordinances must be instituted before a competent tribunal—contradictorily with the accused—and not *ex parte* by resolutions of the council.

An appeal from a mayor's court will not be dismissed for irregularities and deficiencies in the transcript, if the latter contains the ordinance on which the judgment complained was predicated. Such defects cannot be attributed to the fault of the appellant.

Baton Rouge vs. C. Cremonini, p. 247.

Creditors of a municipal corporation have no right to invoke the remedy of injunction to restrain municipal authorities in the exercise of their administrative functions, except as an adjunct to a remedy for the enforcement of their debts.

In this case there is entire failure to establish plaintiff's right to the mandamus prayed for, to pay his debt, and, therefore, the remedy by injunction must fall with it.

E. Droz vs. East Baton Rouge, p. 307.

MUNICIPAL CORPORATIONS—*Continued.*

It is essential to the validity of bonds issued by a municipal corporation, that the ordinance creating the debt represented by them, should provide the means for paying the principal and interest of the same.

Nor is this requirement met by the fact that the bonds were issued in lieu of a cash subscription for stock in a railroad, which subscription was to be paid by means of a special tax. The provision for the payment of the stock was not available for that of the bonds.

Nor does the consent of the qualified voters, of the town or city, to the issuing of the bonds dispense with this requirement, where the ordinance, under which they issued, defective with respect to the requirement, was never submitted to the voters for ratification.

N. K. Knox vs. Baton Rouge, p. 427.

Municipal ordinances are not required to be read *in full*. Where the law directs that they be offered at a regular meeting and they are thus offered and laid over to the next regular meeting and then again called and laid over to a future fixed day, which is an adjourned regular meeting, and a continuation of the former ones, and are adopted within the time prescribed, they will become final in the absence of a motion to reconsider, and are obligatory when promulgated by the municipal executive.

An ordinance relative to licenses, adopted in December, 1881, previous to a State law on the same subject, passed in January, 1883, is valid, though it prescribes different amounts.

New Orleans vs. Brooks, Conner & Norton, p. 641.

A legislative grant to a municipal corporation to "pass such ordinances, rules and regulations as they may deem necessary for the police and government of the said town," and "to have exclusive control of the license and sale of spirituous or intoxicating liquors," implies as a necessary incident thereto the power to pass and enforce an ordinance to prohibit the sale of liquors within corporate limits on Sunday, as a police regulation. The exercise of such power is not amenable to the constitutional inhibition against the establishment of any religion by law, or to any other constitutional limitation to legislation.

The defense that the liquor was sold by an employe of the defendant, who is not a clerk or bar-tender, but a mere porter or menial servant, who thus acted beyond the scope of his employment and in disobedience of the proprietors' orders, is good.

Minden vs. Silverstein & Dittmer, p. 912.

NATIONAL BANKS.

A share-owner in a National Bank has the absolute right, while it is a going concern, to make a *bona fide* and actual sale and transfer of his shares to any person capable in law of purchasing the same and of assuming the seller's liabilities in respect thereto, fraud being absent from the transaction, and the seller for his protection against creditors of the bank in case of insolvency, may compel the buyer to register the transfer in the bank-book, or do it himself.

Under the provisions of the National Banking Act, the Bank is not legally disabled from prosecuting the business of banking until she is protested for failure to redeem her circulating notes. Until then the bank is a going concern.

The object of that statute, when it charges stockholders with liability in case of the Bank's insolvency, is to get at the real owner of the shares, and the courts in construing it uncover all his disguises, so that if his name has never been on the transfer-book, and his stock stands in the name of another by his procurement, he will yet be chargeable with the statutory liability.

But if his sale was real, not made to escape liability, not to an irresponsible person, not collusive or fraudulent, and made while the bank was going, he will not be chargeable under the statute.

Lesassier & Binder vs. S. H. Kennedy, p. 539.

NEW ORLEANS.

Members of the City Council of New Orleans incur no personal liability to a judgment creditor of the city for a failure to levy a tax or provide in the annual budget for payment of the judgment, where, at the time, there exists a legal limitation on the taxing power of the city, by the effect of which a designated portion of the taxes authorized to be levied, is to be applied towards paying certain bonded indebtedness of the city, and the residue within the limitation, is appropriated by the Council to the alimony of the city, except a small amount reserved for judgments, which amount was exhausted by judgments prior in registry to the suing creditor, and where the creditor has not resorted to a mandamus before or after the adoption of the budget to compel the municipal authorities to provide for the payment of his judgment. The Council in such case was not bound to trench upon the funds reserved for the alimony of the city to pay said judgment. The making of the estimate for the necessary expenses of the city government involves a legislative discretion, with which courts will not, unless under exceptional conditions, interfere.

Cancellation of Bonds of Isaacson, et al., p. 56.

NEW ORLEANS—*Continued.*

Section 14 of Act No. 33, of 1877, which authorizes the city of New Orleans to apply the stock which it acquired in the Waterworks Company, to the reduction of the bonded or floating debt is repealed, altered or modified by section 5 of Act No. 133 of 1880.

Under the terms of that section, the Board of Liquidation is entitled to receive from the city all its property, real and personal, *not dedicated to public use*, and the city can be compelled by *mandamus* to turn it over to that auxiliary State functionary.

The stock in question, although declared to be exempt from seizure, has never been pronounced to be and is not property *dedicated to public use*. It should be transferred by the city to the Board, to be disposed of and applied as the law directs, by that organization.

The State ex rel. Board of Liquidation vs. New Orleans, p. 524.

In the absence of a published petition on the part of abutting proprietors, or of a similar notice of intention on the part of the city, based on a resolution duly adopted for the paving of a street, recovery cannot be had from the front owners for the cost of such improvement.

Section 1 of Act 73 of 1876, applies to ordinary streets; section 2 refers to streets, or roadways, in the centre of which runs a middle, or neutral strip (not private property). It is in the last case only that the city can, by ordinance and of its own motion, order a paving, but this can be done solely after a proper vote of the Council, and publication of a notice of municipal intention, subject to the right of front proprietors of objecting, on valid grounds.

Section 3 of that act, which declares that the notarial contract for the work, executed by the Mayor, shall be *prima facie* proof of compliance with antecedent legal requirements, is not *conclusive* on that subject. It shifts the burden on the property owner, who must be permitted, on plea and proof, to rebut it.

The authority to make local assessments does not exist unless unequivocally conferred. It can be exercised no further than clearly delegated. Where the mode in which it can be done is prescribed, it constitutes the measure of the power and must be followed.

C. J. Fayssoux vs. Succession De Chaurand, p. 547.

Where a creditor obtains a money judgment against the city and registers it under the provisions of Act 5 of 1870, he cannot by *mandamus* compel the city or board of liquidators to issue bonds in satisfaction of the judgment, on the plea that the work done which formed the consideration of the judgment entitled the creditor to the bonds demanded.

The State ex rel. Eugster vs. New Orleans, p. 726.

NEW ORLEANS—Continued.

When the City Council of New Orleans adopt the annual budget, the estimates of expenditures made therein become appropriations specifically made for the purposes set forth and no diversion of the funds thus appropriated can be made until all the expenditures provided for have been paid

If there is a surplus after such expenditures have been paid, it may be appropriated to any legitimate purpose.

An amended budget may dispose of other revenues than those destined by the annual budget to specific purposes, but it cannot change these last so long as the expenditures provided for in the annual budget are unextinguished.

The fact that holders of claims provided for in the annual budget have not instituted proceedings to prevent the misappropriation of the revenues allotted to them until ordinances have been passed for the payment of claims under an amended budget, does not bar them from asserting their right to priority of payment before any payment to any one has been made.

Creditors of the city may enjoin the diversion of funds that have been specifically appropriated to them. Such injunction is not within the prohibition to any court to order or enforce summary process against the city, but rather a contest between rival creditors for a fund that the city is about to pay to one to the detriment of the other.

G. K. Shotwell vs. New Orleans, p. 938.

NUISANCE.

The fact that the damage complained of is inflicted by a public nuisance, will not prevent a recovery at the suit of an individual, if he has suffered a special and particular damage therefrom, different from that which is common to all.

A public nuisance is one, the effects of which are common to the general public, and which does not produce any special or particular damage to any one person as distinguished from the rest of the public.

If a nuisance is susceptible of being both public and private, and is so to such an extent that an individual right is violated, then the private remedy is permissible, even though the result may be to open the door to a multiplicity of suits. Thus, smoke, noise, noxious vapors, noisome smells, or other cause which creates a public nuisance, may, by interfering with comfortable enjoyment of property, create a private nuisance as well, and cause a special and particular damage which will justify an individual action for damages.

NUISANCE—*Continued.*

Where the right to the private action exists, injunction will lie to restrain the continuance of the nuisance and suppress it.

The City Council cannot legally authorize what will produce a private nuisance. A municipal body cannot do more than a State Legislature, and although what is authorized by the Legislature within the scope of its constitutional power cannot be a public nuisance, it may be a private nuisance, and the legislative grant is no protection against a private action for damages resulting therefrom. *A fortiori* is this true of authorization from a City Council.

J. A. Blanc et al. vs. J. A. Murray, p. 162.

PARTITION.

A partition of a tract of land, made under a decree of the Supreme Court affirming that below, if attackable, can be attacked only in a direct action for its annulment.

The details for making partitions prescribed with minuteness in the Civil Code are made with special reference to partitions of successions. When a partition is sought between co-owners of property who are not co-heirs, the general rules thus prescribed will govern, but such details as are manifestly inapplicable will not be considered sacramental. *D. C. Paul vs. Heirs of Lamothe, p. 318.*

In an action of partition, the judge has the legal authority to select the best means of discovering the most efficient mode of effecting the partition; to that end he may appoint experts for the purpose of examining and reporting the true condition of the property, and of suggesting a mode of partition. The law does not require him to consult either party in the selection of experts.

In their examination and deliberations, the experts are not required to proceed contradictorily with the parties; they are not compelled to notify or consult either.

R. C. Cameron vs. M. A. Lane, etc., p. 716.

PARTNERSHIP—

In an action for the settlement of a commercial partnership, it is necessary to join, as party plaintiff, the apparent transferee of a portion of the partnership interest if it appears that such transferee was a person interposed, with no real rights in the premises.

In a litigation growing out of a written contract between parties as common carrier, parol testimony is admissible to prove a subsequent verbal agreement, conferring certain privileges to the managing partner of the concern, such as carrying certain merchandise on the partnership boat for such partner free of charge.

J. Janney vs. J. J. Brown, p. 118.

PARTNERSHIP—Continued.

As between the parties, consent is essential to establish a partnership, by which is meant not that the parties should qualify their contract as a partnership *eo nomine*, but that such consent should appear either from the terms or the nature of the contract. Where, as in this case, it affirmatively appears that one party employs the other and agrees to pay him a stipulated proportion of the net profits as compensation for services, that does not constitute a partnership *inter sese*.

The fact that plaintiff carried on business in the name of Halliday & Co., without any partner, cannot relieve defendant from paying him what he justly owes.

Defendant being the manager of the business in New Orleans, in the absence of plaintiff, who resided in St. Louis, and having control of the book-keeper and books, the books are proper evidence against him, being, properly speaking, his own statements of the business to his absent principal. Other defenses are without merit.

G. V. Halliday vs. H. F. Bridewell, p. 238.

Sections 2668 and 2669 of the Revised Statutes, are intended to prevent the use of the name of a person not evidently interested in a firm and thus inducing a false credit to which it was not entitled. While they are designed to prohibit the *obtaining*, they do not forbid the *giving* of credit. A debtor cannot repudiate a contract of which he retains the fruit.

J. R. Kent & Co. vs. J. F. Mojonier, p. 259.

A party seeking to recover under an alleged partnership, against his alleged partner, must prove the existence of the partnership with legal certainty.

In this case, in which plaintiff claims that he was a partner with the defendant in the construction of certain wharves and in a wharfage business carried thereon, the evidence shows that the wharves had been constructed under a contract made by defendant in his individual name, with funds realized by means of his individual note; and that the plaintiff was his solicitor and collector on a compensation consisting of one-fourth of the gross receipts of the wharfage business. Hence, there was no partnership and plaintiff has no ownership in the wharves.

E. S. Maunsell vs. H. Willett, p. 322.

Creditors of an individual cannot apply the assets of a partnership, of which that individual is a member, to the payment of his debt, to the prejudice of creditors of the partnership.

PARTNERSHIP—*Continued.*

The partnership could have resisted a wrongful application of its assets, and what it could have done, its creditors can do.

The acquiescence in or consent to this wrongful application by the other members of the partnership cannot destroy or impair the rights of the creditors of the firm upon the firm assets, after they have been fixed by the attachment of those assets.

Carter Bros. & Co. vs. Galloway & Burns, p. 473.

Although the members of a planting partnership are bound only jointly for partnership debts, yet they may stipulate for a solidary obligation by special contract, and they will be so held by the courts.

J. U. Payne vs. S. L. James et al., p. 476.

In a settlement of accounts between planting partners compound interest will not be allowed to either party unless it is shown by positive evidence that the party charged with interest had accepted the account as thus made or that he had directly or tacitly acquiesced in the charge of annual interest to be considered as capital in each ensuing account. Interest cannot be allowed on a claim never presented to the debtor before suit, which is allowed on a *quantum meruit*, and the validity of which results from the judgment.

The managing partner of an ordinary partnership is entitled to be reimbursed his actual expenses necessarily incurred in the interest of the partnership. *G. M. Bayly, Ex'or, vs. M. A. Becnel et al., p. 496.*

A partnership for doing work of construction on a railroad is an ordinary partnership and does not impose solidary liability on the partners.

C. L. Hardeman vs. Tabler, Crudup & Co., p. 555.

Whoever deals with a partner, who uses the partnership name to direct that partnership property be applied to his individual purposes, is put on his guard by the very nature of the transaction which is beyond the scope of the partner's authority. If he carries out such instructions, he does so at his risk and peril.

One who has thus dealt, in whose hands the property is attached by a partnership creditor and who disposes of it, notwithstanding the seizure, and diverts the proceeds, according to the partner's instructions, is liable to the creditor, *unless* he affirmatively proves that the other partner had assented, previous to the seizure, to the disposition of the assets.

Carter Bros. & Co. vs. Galloway & Burns, p. 730.

PAYMENT.

Matured notes growing out of the same transaction, in the hands of the same creditor against the same debtor, constitute but one debt.

Payments made after maturity of such notes, are imputable to the entire debt.

F. Eyle vs. Catholic Church, etc., p. 310.

PETITORY ACTION.

In a petitory action based on a title derived from the State, to property said to have been forfeited to the State, it is not enough for the plaintiff to prove his deed and its registry. He should show that the State had acquired a valid title to the property.

J. Gatlin vs. J. S. Hutchinson et als., p. 350.

Where, as defense to a petitory action, defendant interposes the plea of prescription, and as he claims the land, to support the plea an actual and continuous possession as owner, for the entire term must be shown.

An offer to buy the land from one holding the adverse title, where not made for the purpose of acquiring an outstanding title and perfecting the title of the possessor, will defeat the plea.

Mere forbearance in judicially asserting a claim to the land will not operate as an estoppel against the true owner so long as prescription has not run, either as relates to the original possessor or a subsequent one.

Where the owner has been compelled to pay the revenues of the land, for one or more years, to the party in possession under an adverse judgment in a possessory action, he cannot, in a subsequent petitory action, recover back the same, nor the costs and expenses of such possessory action. It is, as to all the issues in that action, *res adjudicata*.

A. V. Davis et al. vs. Mrs. C. Young, p. 374.

All issues presented by the pleadings in a cause and on which evidence is introduced on trial, will be considered as disposed of by a final judgment, although the latter be silent on one or more of the issues in the case, unless a special reservation is made in the judgment. Hence, in a petitory action, the judgment which decrees the litigated property to plaintiff, and is silent on the subject of rents and revenues prayed for in plaintiff's petition, when it appears that evidence had been introduced on that demand, will be construed as an absolute rejection of the demand.

Such a judgment will support the plea of *res judicata* to a subsequent action by the same plaintiff, for rents and revenues on the same property, against the same defendant.

Mrs. E. Drouet vs. L. Fairre et al., p. 398.

PETITORY ACTION—*Continued.*

Where the plaintiff in a petitory action claims the land in controversy under a title which he asserts was warranted by the author of the defendant's title opposed to him and that the defendant is thereby estopped from setting up his title against him, the fact of the warranty must be clearly established and may be disproved by evidence showing a distinct and continued acknowledgment of the title of defendant's author by those from whom or through whom the plaintiff claims.

Such acknowledgment may also be opposed to a claim of title by plaintiff based on presumption.

Even where a title has been acquired by prescription, it may afterwards be lost by subsequent adverse possession of the land, peaceable and undisturbed for more than two years, by one holding a just title translativo of the property.

E. G. Randolph, etc., vs. A. L. Laysard, p. 402.

PILOTS.

Under that clause of the Federal Constitution giving Congress power to regulate commerce with foreign nations and among the States, it became vested with authority over the subject of the pilotage of vessels in all the ports of the Union.

Congress has, however, never so legislated as to repeal or supersede the laws of this State on the same subject.

Neither the act of June 1, 1874, nor the regulations of the Secretary of War under it, had such effect.

So, where one holding a license, as pilot, from the United States Local Inspectors of the port of New Orleans, is being prosecuted for an alleged violation of the State law concerning the pilotage of vessels to and from said port of New Orleans, before a State court, the power or jurisdiction of such State court to entertain the prosecution and punish the offender, is not affected or abridged by any law of Congress, or order or regulation of any Federal officer, or by an injunction from a Federal court directed against the parties charged with instigating the prosecution.

The State ex rel. Williams vs. Judge, etc., p. 122.

PLEDGE.

The pledgee of notes secured by mortgage can enforce the collection of them by executory as well as by ordinary process.

The pledgee does not need the consent of the pledgor to institute proceedings for the collection of notes pledged.

J. Chaffe & Sons vs. M. DuBose, p. 257.

PLEDGE—*Continued.*

Plaintiff owned certain corporation stock, which stood on the books of the corporation in her name and for which she held a certificate also in her name. She gave a power of attorney to an agent to *sell* and transfer the stock. The agent fraudulently *pledged* the stock in favor of defendants, to secure the debt of a commercial firm of which he was a member. The pledge was effected by means of a *transfer* to defendants on the books of the company, made by virtue of the power of attorney, and a certificate was issued in the name of defendants. Defendants had no knowledge of the fact that the stock belonged to plaintiff. They accepted the transfer on the faith of the certificate issued in their own name. *Held*, that they were not bound to inquire into plaintiff's title, and that the latter cannot recover.

Mrs. C. Honold. vs. V. Meyer et als., p. 585.

POSSESSION.

Where land has been occupied by an heir in the presence of his co-heirs for many years without objection, and he has paid the taxes upon it, improved it, and protected it from a claim of a stranger; in a suit by the co-heirs for the land and rents, his reconventional demand for reimbursement of taxes, etc., will be liberally allowed and while the plaintiffs get judgment for the land, the defendant shall have judgment for whatever may have been of benefit thereto.

A. Litton et al. vs. H. Litton, p. 348.

PRACTICE.

A prayer for "general relief" does not authorize a judgment recognizing the plaintiffs as owners of cotton, when in their petition they aver the sale of the cotton, non-payment of the price of sale, and claim a lien and privilege on it. The two reliefs are inconsistent.

No valid judgment can be rendered against one made a party, who was not cited and has not joined issue.

It is lawful to appoint a curator *ad hoc* to an absconding debtor, where property in which he has an interest has been seized and he is a necessary party for the decision of the suit.

Where the ends of justice require it, the court will remand a case for further proceedings.

Adler, Goldman & Siegel vs. G. Wolff et als., p. 169.

The only judgment which can be rendered, in the absence of a plaintiff, when no reconventional demand, or one equivalent thereto, has been formed, is one of *non suit*.

N. J. Phillips vs. Cassidy & Powell, p. 288.

PRACTICE—*Continued.*

The Code of Practice contains no rules or special provisions authorizing and regulating applications for continuance of a cause on account of the absence of one of the parties to the suit, who desires to testify in the cause.

Such applications must be left to, and controlled by, the sound discretion of the trial judge, whose ruling will not be disturbed on appeal unless manifestly erroneous or glaringly unjust. A ruling which denies a continuance to a party domiciled in the parish in which the suit is pending, urged on the ground of the absence of that party, at his temporary residence in another parish, and of the indispensable importance of his testimony, which he desires to be taken under a commission, is not erroneous, and will be upheld by the Supreme Court. A continuance will not be granted on the ground that the counsel of the party applying for it is called away, and that his presence is demanded for important professional business pending in the court of another parish in which he resides and practices. *R. S. Cameron et al. vs. M. A. Lane, etc., p. 716.*

The objection that the district judge has passed himself upon a case ordered to be tried by a jury, which was empanelled and sworn and present, will not be considered on appeal, where no bill was taken below to the course pursued. Silence amounts to a waiver, or to acquiescence.

The refusal of a district judge to admit any evidence, on the ground of irrelevancy, in support of the allegations of a petition which discloses a cause of action, cannot be justified.

Under such circumstances, the case will be remanded for further proceedings. *Mrs. E. Noble vs. S. Flower, Adm., p. 737.*

A peremptory exception to the plaintiff's want of capacity to sue cannot be pleaded after answer filed.

J. Montfort, etc., vs. P. Schmidt, p. 750.

The right to amend pleadings is not reducible to inflexible rules. It must be determined in the exercise of a sound legal discretion. Amendments should always be allowed for the promotion of justice, where they cause no injury, provided time may be asked and allowed to a party pleading and showing surprise.

A supplemental answer which simply amplifies a general denial by enumerating the reasons for which plaintiff should not recover, and does not change the original relief asked, can be allowed to be filed shortly before trial and the case will be proceeded with when no motion for a continuance, for time to prepare, is made.

PRACTICE—Continued.

Exceptions to the admission of an act of sale in a case wherein recovery of the price is claimed by a purchaser, in consequence of his eviction from the property sold him cannot avail. The act is the fundamental fact on which the litigation rests. Exceptions to the refusal of the judge to admit cumulative testimony and to the reception of irrelevant proof need not be passed upon.

S. Meyer vs. W. W. Farmer, p. 785.

Where the right of plaintiffs to maintain an attachment against the property of the defendants has been put at issue by an intervenor who claims possession of the property under seizure as a receiver appointed by the court of another State, and one of the defendants, a member of the commercial firm sued, confesses judgment for plaintiffs' debt in behalf of his firm, which confession is questioned as to its effect, and the cause has been submitted after evidence introduced and argument heard, and been taken under advisement, the judge should not replace the case on the docket in the same condition as when submitted. There were issues to be determined and he should have tried them.

Lichtenstein Bros. & Co. vs. Gillett Bros., p. 972.

PRESCRIPTION.

Evidence that a debtor, when presented with a long-standing account of large debits and credits, acknowledged generally an indebtedness, but declined to acknowledge the account, and said he would have to look over his own papers, is not sufficient to interrupt prescription since it left the debt claimed unacknowledged and open to free controversy.

The acknowledgment required by the Code is an "acknowledgment of the right" of the creditor, *i. e.*, of the debt claimed.

A. Shultz vs. H. W. Houghton, p. 407.

Where one is administrator of a succession which has a claim against him individually, or as unconditional heir of another decedent, prescription is suspended during the continuance of the administration. *

Prescription is likewise suspended as to such claim against one who is his co-heir, or who is bound with him in the same manner and for the same sum. A suit by him, as administrator of one succession, against his co-heir in another succession, when their liability *quoad* this claim is the same, would be virtually a suit against himself.

PRESCRIPTION—*Continued.*

A claim against one for rents collected and received by the connivance or consent of the administrator to whom they belonged, is likened to the responsibility of a *negotiorum gestor* rather than a wrongdoer, and the action to recover them is not *ex delicto*. The prescription of one year is not applicable thereto but that of ten years.

The doctrine: "*contra non valentem agere non currit prescriptio*," is not inconsistent with the laws of Louisiana, or repugnant to our system of jurisprudence, and will be enforced in proper cases.

Opinions and *dicta* to the contrary must be considered as overruled.

The decision in the Succession of Farmer, 32 A. 1037, affirmed.

H. McKnight, Adm., vs. W. S. Calhoun, et al., p. 408.

In a suit for damages occasioned by a wrongful act, prescription commences to run, not from the time the act was done, but from the time when damage was sustained in consequence of it.

F. M. Hotard, et al., vs. Railroad Co. p. 450.

The prescription established by law for *privileges* resulting from taxes, does not apply to *mortgages* therefor, affirming State *ex rel.* Jackson, 34 Ann. 178. The prescription provided in sec. 36 of Act 96 of 1877, only applies to future taxes. As to such taxes it is merely a statute of prescription operating as a defense in bar of action and judgment, and does not apply to city taxes which have been reduced to judgment recorded as provided by law. Article 176 of the Constitution fixes a limitation of three years on the excepted privileges for taxes, only when unrecorded and the limitation does not apply to recorded privileges.

H. Davidson vs. H. Lindrop p. 763.

The action to annul a judgment for fraud of the plaintiff must be brought within a year after its discovery, and the interruption begins from the service of the citation and not from the filing the suit.

F. Duplessis vs. A. H. Siewerd et al., p. 779.

Where one appointed as a curator of a vacant succession has brought suit in that capacity to recover from third possessors land belonging to the succession, citation in such suit will operate as an interruption of prescription in favor of the true heirs and representatives, although the appointment of a curator was a nullity. It is sufficient that the defendants had been seasonably notified by judicial demand and citation of the titles which are the foundation of the demand.

The transfer by parties of their rights in property involved in such a suit, to a third person, provided the suit itself is not discon-

PRESCRIPTION—Continued.

tinued or abandoned, is not such an abandonment as will defeat the interruption by citation, in their favor, upon the reversion to them of the rights so transferred.

J. A. Blanc, Adm. vs. L. Dupré, et al p. 847.

In a suit for revival of a judgment, citation within ten years interrupts prescription. If the judgment rendered thereon does not specifically revive the judgment, that error may be corrected by proper proceedings below. *Succession of S. J. Weldon, p. 851.*

PRIVILEGES.

The purchase of such movables as mules cannot destroy the vendor's privilege by impressing upon them the merely metaphysical character of immovables by destination, but such destination is subordinate to the vendor's right.

In an action by vendor of a plantation for dissolution of sale by reason of breach of the resolatory condition, he cannot claim mules attached thereto after his sale, to prejudice of the privilege of the vendor of the mules, nor is he interested in the question of registry of said privilege. *M. Shelly vs. T. L. Winder, p. 182.*

A purchase of movable effects in another State, for delivery in this State, to be paid for on inspection, evidences a contract to be executed in this State.

The vendor of such property is entitled, under our laws, to the vendor's privilege on the movable effects to secure the payment of the stipulated credit instalments.

McIlwaine & Speigel vs. Mrs. Legare et al., p. 359.

The privilege of a vendor of agricultural products of the United States, in New Orleans, exists during five days from the date of delivery, whether the commodity be in the possession of the purchaser or of third parties, where the price of sale is unpaid. Such privilege will be recognized and enforced, where the commodity is seized within that time.

A vendor of such product who issues to the purchaser, an order of delivery addressed to the press where the same is stored, is not estopped from claiming such lien, where the order does not explicitly say that the product is to be delivered *without* vendor's privilege.

It is immaterial by what title the third person holds the commodity, whether by sale or pledge, or otherwise, as, in any case, the ownership or possession passes to him *cum onere*, subject to the vendor's lien which affects the commodity, during five days, without registry, from the date of delivery by the owner to his vendee.

PRIVILEGES—*Continued.*

The lien exists whether the property was sold for cash or on credit, Article 3227 of the R. C. C., as practically amended by the Acts of 1854 and 1855, is an entirety, the latter legislation extending the privileges to cases in which the property is in the hands of third persons, the provision in the first paragraph of the article notwithstanding. The lien or privilege exists in such cases, provided the vendor has not waived it and provided the product has not been validly pledged on the faith of a warehouse or similar receipt, or bill of lading, issued in strict compliance with the law as embodied in the statutes: No. 150 of 1868 and No. 72 of 1876, which do not clash with or repeal the Acts of 1854 and 1855 and article 3226 of the *Revised Civil Code*.

Rulings of this court in 7 A. 371; 13 A. 528; 24 A. 363; 25 A. 82; 26 A. 6; 29 A. 186; reviewed and explained.

S. Gumbel & Co. vs. F. Beer et als., p. 484.

Where factors agree with a planter that they will pay to a third person a stated amount upon receipt from him of a designated number of hogsheads of sugar, and the planter ships a portion of the sugar, the factors are liable to such third person on the stipulation in his favor, to the extent of the proceeds of the shipment. But where a portion of the crop is held by the manufacturers of the sugar under a pledge, which the factors are compelled to pay to get the sugar, and it is also subject to the privilege of the laborers, which they had to assume, and the sugar is shipped to the factors by the manufacturers and in their name, and its entire proceeds is absorbed by these preferred claims, the factors getting only their commissions on it, they are not bound to pay the amount of said proceeds to the said third person under the aforesaid stipulation.

J. T. Moore & Co. vs. E. Clapp et al., p. 690.

PROHIBITION.

Prohibition is the proper remedy to arrest further proceedings in an appealable case where a suspensive appeal has been obtained from the judgment therein rendered and where, the surety being such as the law requires, the lower court assumes to order execution to issue.

The State ex rel. Menge vs. Judge, etc., p. 711.

A Prohibition does not lie to prevent a court which has jurisdiction *ratione personæ* and *ratione materiæ* from entertaining a suit to remove a tutor, where it appears that, after exceptions to the jurisdiction on the ground that the case was not allotted as the Constitution requires have been overruled, the defendant has filed an answer praying for *trial* by jury.

PROHIBITION—Continued.

Although by thus joining issue he has not waived his right to have the judgment overruling his plea reviewed on appeal, still he has, by asking to be tried, abandoned his right to invoke the powers of this court, in the form of a *Prohibition*. He should have done so after his plea was overruled and before answering. The application comes too late. *The State ex rel. Haus vs. Judge, etc., p. 768.*

PUBLIC ADMINISTRATOR.

On an appeal from a judgment appointing the public administrator for the parish of Orleans administrator of a succession alleged by him to be vacant, the question is not whether the deceased had left heirs present or represented, in the State, but whether the existence of such heirs was made known, by opposition or otherwise, to the court, before the rendition of the judgment.

If the judgment was preceded by an application with proper allegations, by public notice, was rendered after legal delays, and without opposition, the appellate tribunal cannot consider evidence brought after the judgment tending to show the existence and presence of legal heirs with a view to obtain a reversal of the judgment.

Succession of A. St. Hubert, p. 388.

Where the opposition of the Public Administrator to the confirmation of a testamentary executor asks that the confirmation be refused and that he, himself, be appointed and confirmed as dative testamentary executor, formalities of law to that effect having been complied with, the dismissal of such opposition on an exception of no cause of action, is appealable.

A direct suit is unnecessary to prevent the confirmation of an applicant for letters testamentary. An opposition thereto, is a proper and efficient proceeding.

Such opposition by the Public Administrator, averring that such applicant cannot discharge the duties of the trust, is expressly authorized by law.

Such opposition implies a vacancy, owing to the inability or incompetency of the applicant.

An applicant, in duress, under a prosecution for the murder of the testatrix, is not in a condition of body and mind to discharge the functions of the office, in the manner in which the law expects an executor to do so.

An opposition setting forth such fact discloses a cause of action. On proof thereof, the Public Administrator should be appointed to take charge of the estate, where the deceased has left no surviving spouse or heir, present or represented, claiming to assume the duties of the office. *Succession of Kate Townsend, p. 535.*

PUBLIC EDUCATION.

Where a mistake has been made by the State Treasurer in announcing to the Superintendent of Public Education the amount of funds for apportionment among the educable children of the State, but before the apportionment could be cancelled the school directors of Orleans had received their quota under it, when the true sum has been ascertained and announced to the superintendent, and a revised apportionment is to be made, it is proper that the superintendent should take into account, when apportioning to Orleans, the sum already improperly paid to her under the mistake, and which payment had been made in consequence of that mistake.

The State ex rel. Board School Directors, etc. vs. E. H. Fay, Supt., etc., p. 241,

A school board organized according to law has a right to stand in court to claim from another school board likewise constituted, school funds which should have been paid to it by the State authorities and which were illegally paid out to the latter. A receipt therefor would exonerate the debtor board.

If the funds are not in kind in the possession of such board, but can be traced to property in which they have been invested by such board, the property itself can be recovered in place of the funds which it represents.

An action to recover under such circumstances is not barred by the prescription of five years or less.

School Board vs. School Board, p. 806.

RECONVENTION.

In a suit between residents of the same parish, in which plaintiff proceeded by attachment of his debtor's property, the defendant is not entitled to institute a demand in reconvention for damages growing out of the attachment.

Such a demand is not only different from the main action, but is not necessarily connected with and incidental to the same. In such cases the reconventional demand will be dismissed as in case of non-suit.

A. B. Coco vs. B. Guyral, p: 293.

REGISTRY.

Unless the act from which the vendor's or other privilege is claimed, as affecting real estate, be seasonably recorded in the proper mortgage book of the parish in which the property is situated, general mortgages previously registered (and even certain liens) will take precedence and be satisfied according to their respective rank.

M. Giranovich et al. vs. Hebrew Congregation, p. 272.

REGISTRY—Continued.

A judicial mortgage will operate upon land acquired by the judgment debtor after the recording of the judgment as well as that owned before, notwithstanding the titles do not appear in his name but in that of others who hold for him.

Claims acquired by another after such recording of a judgment against the real owner are subordinated to that judgment, and cannot be satisfied until the judgment creditor has been paid in full.

If such creditor has paid the taxes upon the lands pending the litigation to prevent a sale of them, he is entitled to reimbursement of the sum thus paid along with his judgment, and in preference to any other claims. *W. T. M. Dickson vs. S. Hynes et als.*, p. 684.

REMOVAL TO FEDERAL COURT.

When a citizen of Louisiana brings a petitory action against a citizen of Georgia, the latter of whom calls in warranty a citizen of Louisiana, there arise in the case two distinct controversies, one between plaintiff and defendant who are citizens of different States, and the other between defendant and warrantor who are also citizens of different States.

The fact that plaintiff and warrantor are citizens of the same State cannot prevent defendant from removing the cause to a Federal court.

Where at the first term of court after the suit, defendant in his answer files a demand in warranty, the warrantor is entitled to citation and the usual delay for answering, and the cause cannot be tried until after the expiration of that delay. If it does not expire till after the passage of that term, the following term is the first at which the cause could have been tried, and an application for removal made at that term is timely under the provisions of the act of Congress of March 3d, 1875.

Wm. Davis et al. vs. J. Montgomery et al., p. 874.

RESPITE.

Plaintiff obtained a respite from his creditors under the insolvent laws of the State. In his schedule he reported certain notes as owing one V. M., on whom the usual notices were served, but who did not attend the meeting of the creditors or participate in the proceedings. V. M. & Co. had sued the plaintiff—the insolvent debtor—on the notes before the District Court of New Orleans, before the respite was applied for, but after the same was granted withdrew the suit and instituted attachment proceedings on the notes in the State of Mississippi.

RESPITE—*Continued.*

The notes, though executed in favor of V. M., purported to have been transferred to V. M. & Co., a firm of which he was a member. Judgment was rendered by default against plaintiff—the debtor—in the State of Mississippi, and immovable property in that State, which was included in the schedule of the insolvent, was seized thereunder and advertised for sale. The parties all resided in New Orleans.

Held, that an injunction against the sale properly issued from the District Court of New Orleans, and was properly perpetuated.

C. Prager vs. V. Micas & Co., p. 75.

Where a party applies for a respite under the insolvent laws of the State and files his schedule, and the usual order is rendered thereon, and a creditor representing that his debtor is carrying on business as before and disposing of his property, prays for an order requiring the debtor to give bond to cover his claim and as indemnity against the alleged disposition of property pending the proceedings for a respite, which order is granted, the same can be appealed from.

This appeal is not premature because the appellant had failed to move for the rescinding of the order before taking the same.

Dudley Coleman & Bro. vs. Creditors, p. 113.

Even though the meeting of creditors convened to vote on a respite has been formally closed by the Notary after having been adjourned from day to day, each day receiving votes, yet, if other creditors present themselves on the next succeeding day, before the *proces verbal* has been returned to court and within the ten days from the opening, their vote should be received.

In ascertaining what is a majority of creditors in number and amount, those alone who appeared at the meeting, proved their claims and voted are to be reckoned. None other, whether on the *bilan* or not, are to be taken into account.

L. E. & E. F. Herwig vs. Creditors, p. 760.

In respite proceedings, creditors domiciliated out of the State, though not summoned, have the right to appear and vote in the meeting of creditors.

Creditors are not bound to appear at the meeting in person, but may do so through properly appointed proxies or attorneys in fact.

The oath to their debts, of creditors who appear by proxy, may be made either by the creditors themselves before any proper officer, or by their proxies before the notary holding the meeting, pro-

RESPITE—Continued.

vided the proxies swear of their own knowledge and not merely of belief or of derivative information.

Creditors who have voted at the meeting have no right to withdraw or change their votes, without legal cause assigned, after the *proces verbal* of the meeting has been returned into court and during the pendency of proceedings for its homologation.

Under the terms of the Code, the filing of a proper schedule of assets is a condition precedent to the binding effect of the respite upon creditors.

When such schedule has not been filed, the defect may be urged as ground of opposition to the granting of the respite. When the respite has not been refused by the creditors, but has been refused by the court on the ground of defect in the proceedings, the cession of property does not follow under the terms of the Code, but the relief sought by the applicant is simply denied and the case terminates.

F. K. Philips vs. Creditors, p. 904.

SALE.

An agreement by which one party engages to deliver to the other such quantities of coal as the latter may require during the year "to the extent of 60,000 barrels with privilege of 20,000 more," at a stipulated price, but containing no obligation on the part of the latter to take or pay for any stipulated quantity, is a *nudum pactum*, from the performance of which the promisor may, at any time, withdraw. One promise may be a good consideration for another promise, but there must be a mutuality of engagement.

W. S. Campbell vs. A. Lambert & Co., p. 35.

The purchaser of a commodity, without exhibition of samples, is entitled to recover back money paid for accommodation, in advance, when, after inspection of the articles, it is found not to be of the expected standard.

Adler, Goldman & Siegel vs. G. Wolff et als., p. 169.

Although the contract of sale be perfect, when entered into by competent parties the moment that the thing and the price are agreed upon, and although the purchaser may be considered as the owner of the property, such vendee is not entitled to demand and obtain possession, and in default to claim rents and revenues, where the price payable *cash* has not been paid, but was retained without justification.

Payment of the price is an essential condition, precedent for demand of delivery or possession.

SALE—*Continued.*

Purchasers of real estate at succession sales who assume to withhold payment on the pretence of paying an anterior mortgage creditor and applying the residue to their own next ranking claim, do so at their risk and peril.

Where it is subsequently judicially ascertained and decreed that such purchasers have retained more than they should have done and illegally withheld payment, and that such purchasers have to pay and they do actually pay, it is only from the time of such payment that they are entitled to demand and receive delivery and possession of the property to them previously adjudicated.

Purchasers or adjudicatees thus in default cannot stand in court to recover for the fruits and revenues of the property prior to the date of payment. They cannot both keep the money and enjoy the property.

An action by them for rents and revenues does not lie against one in possession and who is not the vendor, where it was by agreement with such party that the suit was brought, and where the title or sheriff's deed was recorded after the period for which compensation is sought.

The unqualified taking possession of such property claimed to have been dilapidated, is a bar to an action in damages.

J. Lapere vs. T. Badeaux, p. 194.

In a contract of sale for the delivery of a commodity at a certain time, the vender who notifies his vendee at about the time of delivery of his inability to fulfill his contract, relieves the latter of the legal obligation to put the vendor in default.

The defaulting vendor is therefore liable for damages, the measure of which is the difference between the price stipulated in the contract of sale and the enhanced market price of the commodity at the time he made default. *J. B. Camors & Co. vs. T. A. Madden, p. 425.*

An agreement by which one transfers to another certain movable property with the proviso and condition that this latter is to sell it, pay himself what the transferrer owes him, and distribute the residue to certain named persons, is not a sale, and the transferee does not thereby become the owner of the property. He is at most a bailee or trustee.

A seizure under *fi. fa.* of this property by a judgment creditor of the transferrer is lawful, and an injunction by the transferee restraining the sale of it, will be dissolved with damages.

J. A. Bourg vs. L. Lopez et al., p. 439.

SALE—Continued.

A party suing for an account of money and securities entrusted to another cannot, in the progress of trial, be allowed to shift his position and assume in argument that the property in question had been pledged and had been tortiously disposed of by the pledgee.

A debtor who transfers securities in full ownership to his creditor in settlement of the latter's claim, with the right of redemption within a specified time, loses all rights and titles of ownership to that property if he fails to redeem within the prescribed delay. Such a contract is one of sale and not of pledge.

J. Pomez vs. J. B. Camors & Co., p. 464.

S had a contract with C for a supply of coal, and was unable to get the cash to make tender of the sum stipulated for advance payment. L bargained with S to avail himself of this contract and for the purpose of fastening it upon C, handed S the money to make the tender. C refused to receive it. S was unable to perform his contract with L and the latter demanded of him the refunding the money.

Held, that L could enforce his demand and was entitled to judgment for the amount with interest.

A. Lambert & Co. vs. J. P. H. Short, p. 477.

Where the payment of the price of immovable property is resisted on the ground that the vendor was not the sole owner, but that another party had an interest in it, and the vendor agrees that, if this other party will renounce in his favor, he shall share the price with him when collected, such agreement can be proved by parol and if proved should be enforced.

Nor will the disclaimer made of title in the act of renunciation estop the party from recovery under the agreement or be used to show that the party had no interest and that the agreement was a *nudum pactum*.

F. Bellocq et al. vs. P. G. Gibert et als., p. 565.

The notice of a transfer of credit served on the attorney or counsel of the alleged debtor, is insufficient to bind the creditors of the transferee. A seizure of such credit, notwithstanding such notice, will be maintained.

A. Morrison vs. J. A. Lynch, p. 611.

A purchaser who buys property adjudicated to a succession representative at a judicial or forced sale of the same, in furtherance of an agreement between them that he will not bid thereon against him, and whose purchase is subsequently annulled in consequence of such reprobated combination, must be considered and dealt with

SALE—*Continued.*

as a buyer who purchases with knowledge of the danger of eviction and at his peril and risk. Under such circumstances he cannot, after eviction, repete the price paid.

No case can be found where, money having been paid by one of the parties to the other upon an illegal contract, both being *participes criminis*, an action has been maintained to recover it back.

S. Meyer vs. W. W. Farmer. p. 785.

It is not vicious pleading where two demands are coupled, not inconsistent nor contrary and where one does not exclude the other, as where there is an express warranty of title with stipulations that in case of eviction the vendor will return the purchase price and reimburse the cost of improvements, or will reimburse the vendee such sum as he may pay to avoid dispossession.

In such case, where there has not been an actual eviction but a purchase of the superior title, the vendee will recover the sum paid for such title to avoid dispossession.

E. Filhiol vs. R. G. Cobb, p. 792.

SEQUESTRATION.

An intervenor in whose possession, other than as owner, *pledgee* or *consignee*, property has been judicially sequestered, has not the right in law to release said property on a forthcoming bond.

Under our law that right is restricted to the parties to the suit, and to an intervenor who shows a *prima facie* case of a *bona fide* title as owner, pledgee or consignee.

J. Hardy vs. J. H. Lemons, p. 107.

An *affidavit* that the petitioner has sold cotton, the price of which is unpaid and on which there exists a lien, and that the purchaser is about to convert the cotton, thus sold, into money or evidence of debt, with intent to place it beyond the reach of his creditors, is amply sufficient to authorize a writ of sequestration, which will be maintained, if executed within five days after the delivery of the cotton.

A. Gumbel, & Co. vs. F. Beer, et als. 484.

In a suit to recover immovable property and to annul a Sheriff's sale, under which defendant claims title thereto, accompanied by more than one year's possession, a sequestration of the property should not be ordered without the usual bond, on an allegation that the defendant is collecting the revenues and fails to pay the taxes and make the necessary repairs to the property.

J. Pasley vs. Mrs. A. McConnell, p. 703.

SIMULATION.

Where a party makes a conveyance of immovable property for a valuable consideration, which he receives when the act is passed, and the deed is recorded in the parish where the immovable property is situated, and followed by possession, a judgment creditor of the vendor cannot make a direct seizure of the property because of the fact that the one to whom the conveyance was made was not purchasing for himself but for others, who paid the consideration, and to whom the ostensible purchaser gave a counter-letter, which, however, was not recorded before the seizure. To justify such a seizure, the sale in question must be a pure simulation in all respects.

Nor will it avail the seizing creditor that the property is described in said deed, not by metes and bounds, but the deed conveys all interest and right and property in certain successions named, and the property seized once belonged to those whose successions are so named, and was inherited jointly by the said vendor and those for whom the purchase was made.

The real purchasers have the right to enjoin the seizure,

Mrs. O. Gauthreaux vs. Sheriff et al., p. 179.

A simulated sale and mortgage of lands can be attacked by creditors of the apparent vendor when proceedings are taken to foreclose the mortgage.

J. D. Walsh vs. L. F. Carrene, p. 199.

One, who alleges himself to be the owner of a judgment, who charges that the title to the same, in another party, is a simulation and who asks to be recognized as owner, contradictorily with that party, does not attack the title *collaterally*, but *directly*. Evidence to prove simulation of the title attacked is well admissible.

Simulation having been proved, plaintiff is entitled to relief.

G. M. Klein vs. Dennis, Sheriff et al., p. 284.

In suits to uncover simulations the largest latitude is allowed in the reception of testimony.

W. T. M. Dickson vs. S. Hynes et als., p. 684.

SUCCESSIONS.

Heirs of age coming to a succession concurrently with a minor, when there are no money legacies and no debts to be paid, and when no one demands an administration and asks security, are entitled to take the seizin from the executors and be put in possession of their share of the inheritance, conjointly with the minor for whom the law has accepted under benefit of inventory. When they are recog-

SUCCESSIONS—*Continued.*

nized and put in possession, the executors must render them and the minor an account of their administration within a reasonable time, to be fixed by the court.

The division of a District Court having jurisdiction over the succession of a wife, cannot order the delivery and exclusive possession, to her executors, of a box containing valuables belonging equally to it and to the succession of the husband, whose heirs of age have been, by another division, recognized and put in possession of their share of inheritance in the same.

Heirs of age who have collected, after being judicially recognized, rents belonging to the succession of their mother, will not be ordered to return the same and prohibited from further collections, although the decree recognizing them was subsequently reversed on appeal, where the court passing upon the proceeding to *return* and to *prohibit*, recognizes them and puts them in possession of their share in the same succession.

Succession of Theresa Baumgarden, p. 46.

The rules relative to the time of payment of debts, delivery of legacies and the separation of patrimony find no application in cases of thoroughly solvent successions.

Succession of John Geddes, p. 53.

The legatee who sues for the nullity of a sale of succession property adjudicated to the executor of the will of the testator, by means of a third person, cannot be successfully met by the exception of want of previous tender of the price of adjudication. If the funds thus received had been used to extinguish the debts of the succession, the executor could recover the same in due course of administration. He would be entitled to no other relief.

The fact that the sale had been provoked by a creditor of the succession does not alter the legal effect of the purchase by the executor.

J. M. Stanbrough, etc., vs. McClellan et als., p. 234.

Where an heir, who is administrator, joins with his co-heirs in mortgaging the property of the ancestor, this operates an unconditional acceptance of the succession. Whatever may be the rights of creditors, such an heir cannot thereafter, on his own motion, resume the capacity of administrator and oppose the title of the mortgage creditors, derived from a sale, under foreclosure, of the mortgage against the heirs. He is estopped.

B. T. Scott vs. Warden Briscoe et al., p. 278.

Exceptors have no interest to question the validity of the judgment of the parish court of Concordia recognizing their opponents as widow and heir of Hitchcock and putting them in possession of his estate.

SUCCESSIONS—*Continued.*

They exhibit nothing throwing doubt upon the sole heirship of the heir or indicating any other person having rights as such, and whether the mother be surviving widow in community or not, she is recognized as such by the heir, who has accepted unconditionally and joins her in these proceedings, by which she is fully bound. *Mrs. C. H. Gibson vs. B. F. Hitchcock et al.*, p. 297.

A beneficiary heir, of age and present, is entitled to the dative executorship to the exclusion of all others.

If the beneficiary heir be a minor with both parents living, they are entitled to the executorship as representing him.

The term, beneficiary heir, includes one who may accept the succession equally with one who has accepted it.

Succession of Theo. Gusman, p. 299.

Where the deceased owed no debts, and the claims against the succession are small and not urgent, an injunction by the beneficiary heirs or their representatives, restraining the instant sale of the property, will be maintained, if such heirs offer to pay the debts and legacies, or tender a sum sufficient to cover them.

Z. Hearsey vs. Bates, Sheriff et al., p. 300.

The fees of an attorney of absent heirs are chargeable to the portions of the heirs whom he represents.

An exception will apply to cases where the services of such attorney have proved valuable and beneficial to the succession, in which cases he will be allowed a reasonable compensation out of the mass of the succession.

In a contest for the administration of a succession, the attorney of the defeated applicant has no claim for his services against the succession. But in a case where the defeated applicant is named as an alternate executor in the will of the deceased, his attorney will be entitled to a reasonable compensation from the succession for such of his services as were beneficial to the estate, such as procuring an inventory and the appointment of an attorney of absent heirs and the like.

Succession of W. Florance, p. 304.

A party alleging himself to be a creditor of a succession, and praying in that capacity for an increase of the administrator's bond, cannot be required to furnish the same conclusive proof of his claims which would be exacted of him if he was suing for the recovery of his claims. Our law books with favor on proceedings intended to scrutinize the conduct of administrators, and to increase the security of creditors and of other persons interested.

SUCCESSIONS—*Continued.*

An administrator will be required to furnish a new bond, so as to cover newly discovered property, and to the full extent of the value of the whole succession property as shown by a supplemental inventory provoked by the administrator himself.

An administrator should not be required to furnish bond on the basis of an inventory in which property was inadvertently included which was not owned by the deceased, but which was judicially declared to belong to a different party.

Although the amount of the bond be fixed by the Supreme Court, an inquiry as to the ownership and value of such property can be instituted in the lower court, which has power to reduce the amount, where authorized to do so, subject to the right of the party aggrieved to have the action reviewed on appeal.

C. E. P. Calhoun vs. H. McKnight, Adm. p. 414.

The commissions of an administrator of a succession are forfeited by mal-administration.

Where the assets of a succession consist alone of money, of which the administrator refuses to render an account, until it is extorted from him through repeated orders of court and under pressure of a rule for contempt, everything will be construed against him, and the heirs shall have judgment for the sums found to be due by him with ten per centum per annum interest thereon.

Heirs are not remitted to a direct action against the administrator of their ancestor's succession to recover the sums he owes them. The proper and natural place for such demand is on the succession proceedings by opposition to his account, or by invoking the compulsory process of the court to compel him to file an account when he has failed to file any.

Succession of J. Touzanne, p. 420.

The appointment of an administrator is not necessary, and it will be refused, in a proceeding intended for the settlement of a community between the surviving spouse and the forced heirs of the deceased, when the succession owes no debts, and when it appears that the community can be legally settled by means of a partition between the heirs and the surviving spouse who has contracted a second marriage.

Succession of Ellen Welch, p. 702.

Testamentary dispositions, by which the testator provides that his estate is to remain under the control and administration of his executor for an indefinite length of time, to be preserved for the persons instituted as legatees by the will, and by which he directs that a part of his estate shall be paid over to the minor children of

SUCCESSIONS—*Continued.*

one of the legatees after they become of age and marry reputably, show a manifest intention to create a trust estate, which is considered in our jurisprudence as a *fidei commissum*, and are therefore void under the laws of Louisiana.

Succession of Will. Stephens, p. 754.

An opponent who does not dispute the correctness of any of the items of an administrator's account, but simply claims to be placed thereon for a larger amount, has no interest to attack a judgment of homologation on the ground that proof was not administered of the correctness of the account.

The rulings of an instance court on the admission or rejection of evidence are not subject to review by this Court in absence of exception reserved thereto.

The correctness of the judgment appealed from must be tested by the law and the evidence upon which the court acted, in absence of exceptions to rulings made in course of the trial.

Succession of Gayle Woods, p. 757.

The issues arising under a provisional account filed by a former administrator, and the oppositions thereto are not identical with those presented by a suit for a final account brought against the former administrator, after his removal, by his successor in office.

Even if they were identical, the former proceeding would only furnish ground for a plea of *lis pendens* in the latter suit, which could not be set up except *in limine*.

When an administrator has been removed, he owes to his successor in office an account of all funds and property which he had received for account of the succession. In an insolvent succession, he cannot in such account claim credit for debts of the succession paid by him on his own responsibility and without judicial order or authority. He was not vested with power to rank the creditors and distribute the succession funds. Such ranking and distribution can only be made by the court, after hearing all the creditors upon proceedings according to law. He must pay over to the new administrator the funds received by him, for distribution according to law. And it is only upon such proceedings of distribution that he can assert his claim, contradictorily with all creditors, for reimbursement of the sums paid out by him in the extinguishment of succession debts, to the extent that the succession has been benefited by such payments.

J. Chaffe, Adm., vs. W. W. Farmer, p. 813.

SUCCESSIONS—*Continued.*

The second administrator of a succession who sues the succession of the first administrator of the same succession for a moneyed judgment for funds alleged to have been received by said administrator and unaccounted, will be successfully met by an exception of no cause of action. His suit should be for an account and not for a moneyed judgment.

B. Granger, Adm., vs. J. S. Reid, Adm. p. 845.

The functions of an executor are at an end when he has discharged the debts and legacies and rendered his account. He cannot afterwards prolong his administration for the purpose of effecting, by suit, a liquidation of the conjugal community that existed between the testator and his surviving spouse, and a partition of the community property, not even if joined by the heirs in such suit.

When his duties have terminated and his account homologated he cannot properly refuse the demand, made by the widow in community or heirs, to surrender the property in his hands to them. The settlement of the community and partition of the property must be left to them.

Succession of J. Geddes. p. 963.

SURETYSHIP.

Where, in a suit against the sureties of a sheriff, it is admitted that this officer has collected and failed to pay over on demand, city taxes, exceeding the amount of his bond, under judgments and writs in favor of the city, for part of which amount his sureties are sued; the fact, if true, that the sheriff, as an individual, under private contract has made collections of city taxes, cannot affect the liability of his official sureties in such suit.

Nor does the exaction of another bond, by the city, in addition to his official bond, in order to secure prompt collections and stated settlements of city taxes, have such effect.

Where a delay is granted the sheriff during the pendency before the Legislature of a bill for his relief, it does not release the sureties for his defalcations occurring subsequent to the expiration of such delay. This Court can give no effect to documentary evidence not offered on the trial and placed in the transcript without the consent of the party or his counsel whom it is designed to effect.

City vs. J. R. A. Gauthreaux et als. p. 109.

Where an injunction has arrested the execution of a judgment for a sum of money, the surety to the injunction bond is not entitled to notice of the judgment of dissolution and for damages before the issuing of execution thereon.

SURETYSHIP—*Continued.*

The surety to an injunction bond in such case is not merely constructively in court, but is an actual party to the suit, made co-plaintiff *ipso facto* by the mere act of suretyship, and invested by the law *proprio vigore* with all the attributes, qualities, rights and burdened with the liabilities of his principal, and is entitled to citation and notice as is his principal.

J. B. Friedman vs. Adler & Levy, p. 384.

Under the provisions of Act 24 of 1876, amending Article 575 of the Code of Practice, the surety must not only be good and solvent and reside within the jurisdiction of the court, but have property susceptible of being legally reached by the sheriff and subjected by him to the payment of the pressing creditor. A surety who carries all his property in his pocket is not such a surety as the law requires on judicial bonds furnished to suspend the execution of judgments. 28 Ann. 884, overruled.

The surety in this case is not a sufficient one and the order of appeal was properly rescinded.

The State ex rel. Menge vs. Judge, etc., p. 711.

Article 2203 of the Civil Code, which provides that "the remission or conventional discharge in favor of one of co-debtors *in solido* discharges all the others," applies to obligations *ex delicto* as well as to contract obligations.

Orr & Lindsley vs. W. Hamilton, p. 790.

TAXATION.

Act No. 4, of 1882, sec. 10, is not unconstitutional.

The license imposed is graduated and uniform, as is required by articles 206 and 203 of the Constitution.

The word "*graduate*," there used, means "*proportion*." The Legislature can levy a license tax, where the amount is regulated and fixed on an established basis, to which it must bear a certain proportion. The Legislature can divide trades, professions, vocations and callings into classes and assess a license on the persons composing the several classes, provided it be equal and uniform on all persons of the same class.

A license for keeping places for "*variety performance*," can well be graduated or proportioned on the basis of the population of the city or town in which the same are kept.

A law which imposes such license for keeping such places in cities or towns, the population of which *exceeds* 25,000 souls and fixes the same at \$1,000, and which imposes such license for keeping such places in such cities or towns, the population of which is *less* than

TAXATION—*Continued.*

25,000 souls and fixes the same at \$500, operates equally and uniformly on the two classes, and does not violate the constitutional provision against local or special legislation. It is general in its purpose and in its terms, and designed to reach all persons belonging to each class, throughout the whole territory of the State.

The State vs. M. J. O'Hara, p. 93.

Where a city tax is resisted on the ground that the property against which it is assessed is exempt under the Constitution of the State, the question of the constitutionality of the tax is involved, and this court has jurisdiction, though the tax is less than \$1,000.

A manufactory of fish lines, ropes, packing and other hempen articles is exempt from taxation under Article 207 of the Constitution, where the required number of hands are employed therein. Nor does it affect the exemption that the premises are occupied by the owner and his family, where it is shown that the premises and the articles manufactured and in process of manufacturing required protection and constant watching.

City vs. Nicholas Arthurs, p. 98.

The question of the constitutionality or legality of the interest imposed by the Legislature upon delinquent municipal taxes, does not involve the legality or constitutionality of the tax; nor is it a penalty imposed by a municipal corporation, being imposed, even if a penalty, within the meaning of the Constitution, by the Legislature of the State.

The case does not, therefore, fall within our appellate jurisdiction.

The State ex rel. Rivet vs. Judge, etc., p. 286.

If Section 14, of Act 44, of 1878, which is the charter of the City of Baton Rouge, was inconsistent with the Constitution of 1879, it was either repealed or amended so as to conform with it. If it was not, it reads as the organic law does.

The City Council of Baton Rouge has a right to levy a tax not exceeding six mills for the State and ten mills for the city, under the very terms of the Constitution (art 209).

S. G. Laycock vs. Baton Rouge p. 328.

Garnishment by a judgment creditor of a parish of the parish funds in the hands of the parish treasurer is equivalent to garnishment in the hands of the debtor.

The taxes and revenues of a municipal corporation cannot be subjected to seizure, either in its treasury or in transit thereto, or even in the hands of the tax debtors.

E. Droz vs. East Baton Rouge, p. 340.

TAXATION—*Continued.*

Relators, who are engaged in the business of *milling rice*, cannot claim the exemption from property taxation under Art. 207 of the Constitution in favor of manufacturers of *flour*. The fact that, as an unavoidable incident of their milling business, a refuse is produced which is utilized and sold under the name of "rice-flour" or "rice-polish," does not bring them within the letter or spirit of the Constitutional exemption.

The State ex rel. Ernst & Co. vs. Assessors, p. 347.

The ordinance of the city of New Orleans which exacts twenty-five cents for every load of supplies, especially in so far as it affects the products of gardeners sold by themselves at any of the public markets of the city, is intended to raise a revenue.

Either as a tax on property or as a license, it is unconstitutional, null and void.

The State vs. L. Blaser, p. 363.

A special statute exempting property from taxation in 1858, is not repealed by the Constitution of 1879. *N. O. vs. Poydras Asylum*, 33 A. 850, affirmed.

An unqualified exemption by the State, implies an immunity from municipal taxation. Whenever the sovereign exonerates, he does so with munificence, unless restrictions have been formally expressed.

Under section 9 of Act 74 of 1858, the capital stock of the defendant company is not liable to assessment and tax for fifty years.

New Orleans vs. Carondelet Canal Co., p. 396.

The exemption from taxation of defendant's property by its charter, passed in 1877, is unconstitutional, and the city's demand for taxes is sustained.

To the extent that the exemption was the consideration of defendant's obligation to supply free water to the city, defendant is entitled to relief.

The exemption was not the sole, but only part of the consideration of the obligation to supply free water.

This partial failure of consideration entitles defendant to relief to the precise extent thereof, which is accomplished by condemning the city to pay for its water to the value of the taxes recovered.

New Orleans vs. Waterworks Co. p. 432.

The fees and charges imposed on vessels by the quarantine laws of the State, are exactions in compensation for services rendered, and are not taxes, duties or imposts, within the prohibition of the Federal Constitution.

The Supreme Court of the United States has never decided that the States have not the power to exact such fees in execution of their quarantine laws, but, on the contrary, has intimated that the power does exist as incident to the power to establish quarantine regulations. The power has been long and uniformly exercised by the States, without question.

Morgan's R. R. Co. vs. Board of Health, p. 666.

Relator, a creditor of the city of New Orleans by judgment rendered upon a contract of warranty in a sale of property, entered into in 1837, when the city's power of taxation was unlimited as to rate, is entitled to the remedy of mandamus to compel the levy of a tax for the satisfaction of his debt.

The power of taxation existing at the date of the contract was read into the contract, and so far as necessary for the satisfaction of the obligation thereof, continues to exist as fully as if no subsequent limitations on the taxing power had been passed.

The duty of the city is clear and creditor has the right to exact its performance.

The State ex rel. Carriere vs. New Orleans p. 687.

This Court has not jurisdiction of suits wherein the mode of enforcing the payment of taxes is alone in dispute, unless the amount of the taxes claimed is large enough to bring them within our jurisdiction. It is only where the constitutionality or legality of the tax is contested that our jurisdiction attaches without regard to the amount involved.

Where no sum whatever is mentioned in the pleadings in an injunction of a tax sale, and the advertisement makes no mention that the sale is to be for penalties, only the sum stated in the advertisement as the taxes due will be considered in determining jurisdiction.

R. G. Cobb vs Tax Collector. p. 801.

Vacant property held in private ownership by the authorities of church, who had bought it in anticipation of an increase in size and population of the city in order that the church might have room for improvements in case of such increase, and with the intention of erecting thereon a church, school or hospital when needed; in absence of any actual use for such purposes, and of any immediate intention or preparation to construct such buildings, is not a "place of public worship," or a "charitable institution," or "property used for colleges, or other school purposes," within the meaning of article 210 of the Constitution, and is not exempt from taxation.

Rev. L. Enaut vs. Tax Collector. p. 804.

TAXATION—Continued.

Where there is denial of any assessment, or other issue made of the legality of a tax, this Court has jurisdiction.

While suits for the collection of taxes upon property are prohibited, the prohibition does not apply to the collection of licenses which may be prosecuted by rule or motion, as provided in the legislative act, and in other ways. *Tax Collector vs. V. F. Vogh. p. 812.*

TAX SALES.

Though the State cannot be sued in a State court, yet where an adjudication of immovable property at a tax sale has been made to the State, in a suit against the tax collector making the sale, and the recorder of mortgages who had recorded the assignment alleged to be void, and the register of conveyances charged with the duty of recording the tax title, brought by the original owners in possession, the proceedings connected with the sales of the assessment to the sale may be reviewed by the court and judgment rendered maintaining or annulling the sale and ordering the erasure of the inscriptions.

The State may not be concluded by an adverse judgment in the premises from asserting her rights to the property in a direct action or other proper proceeding.

M. L. Budd vs. Tax Collector, et al. p. 959.

TENDER AND CONSIGNMENT.

A purchaser of real estate and other property, on time, is relieved from the obligation of making a tender and consignment, to relieve himself from interest after maturity, where the vendor himself brings before maturity of the notes, an action to annul the sale; but owes such interest from the finality of the judgment rejecting the demand in nullity in default of a tender and consignment. Article 2559 R. C. C., applies to cases in which the suit to evict is not brought by the vendor, but by others.

The executors of a surviving wife have no right to sue for the recovery of the whole amount of notes belonging equally to her succession and to that of her husband, whose heirs of age are recognized and put in possession. They can sue only to recover the half of the notes accruing to her succession.

The purchaser failing to pay at the termination of the suit to annul the sale, a suit became necessary to coerce payment.

In the event of such suit, the fees of the attorneys employed must be paid by the purchaser at the rate agreed upon in the aggregate of

TENDER AND CONSIGNMENT—*Continued.*

the capital and interest due at the time of the filing of the petition and due the succession represented by the executors.

Zimmermann et al., executors, vs. J. J. Langles, p. 65.

USUFRUCT.

Usufructuaries dispensed from security are entitled to the possession and enjoyment of the property as soon as the debts and charges of the succession of the testator making the bequest of the usufruct have been satisfied.

Testamentary executors, who, after the debts and charges have been paid, deliver possession to such usufructuaries, cannot be held responsible in case of waste and damage by the usufructuaries, who are accountable only to the owners of the property burdened with the usufruct.

A testamentary disposition authorizing executors to administer the succession property does not require them to interfere with such usufructuaries during the course of the usufruct, after such putting in possession.

The exclusion of the tutor of minors, to whom the naked ownership of part of the property subjected to usufruct belongs, from interference with the executors, does not prevent him from protecting the rights of his wards as against the usufructuaries.

Executors authorized by the will to administer the portion of the estate bequeathed to such minors, as they may deem proper, until the youngest of them arrives at his majority, cease to have the right to administer after the usufructuary has been put in possession, but may be called upon to resume and continue the administration of that portion, for the benefit of the minors, only should the usufructuary die previous to the attaining of his majority by the youngest legatee.

A judgment homologating an account of such executors, rendered after putting the usufructuaries in possession and discharging them from liability until then, but retaining them conditionally in office, in case events provided for by the will require them to resume the administration of the property, may help in the construction to be placed upon the will.

A testator has a right to confer the usufruct jointly or in divided portions. A bequest of the usufruct of the same property in the last mode, does not require the executors to place the usufructuaries separately in possession, when they accept a delivery of the whole to both. *E. H. Samuels et als. vs. I. H. Brownlee et als., p. 228.*